TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted]110

SIMON LESSER, PLAINTIFF IN ERROR,

vs.

JAMES R. GRAY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

FILED JANUARY [redacted], 1913.

(23,527)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 443.

SIMON LESSER, PLAINTIFF IN ERROR,

vs.

JAMES R. GRAY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 13, 1914.

1 In the Court of Appeals of the State of Georgia.

S. LESSER, Plaintiff in Error,
v.
INMAN & COMPANY et al., Defendant- in Error.

Bill of Exceptions.

In the case of S. Lesser v. Inman & Company, James R. Gray and Mrs. Frances Jones Inman, being No. 21397, May Term, 1910, of the City Court of Atlanta, a judgment was rendered and signed on June 8, 1910, by Honorable H. M. Reid, Judge of said court, sustaining a demurrer filed in said case by the defendant, James R. Gray, and dismissing the case as to him.

To this judgment the plaintiff in error excepted, now excepts and assigns the same as error upon the ground that said judgment was contrary to law.

Plaintiff in error specifies as material to a clear understanding of the error complained of the following portions of the record, towit:

1. The original petition with exhibits A to E inclusive, filed in the City Court of Atlanta on March 16, 1910, omitting the process and sheriff's return.

2. The demurrer filed in said case on March 30, 1910, by the defendant, James R. Gray.

2 3. The judgment of said court dated June 8, 1910, sustaining said demurrer and dismissing the same.

And now comes the plaintiff in error within the period allowed by law and presents this his bill of exceptions and prays that the same may be signed and certified in order that the error alleged to have been committed may be considered and corrected.

H. A. ALEXANDER, *Atlanta, Ga.,*
C. H. & R. S. COHEN, *Augusta, Ga.,*
Attorneys for Plaintiff in Error.

I hereby certify that the foregoing bill of exceptions is true, and specifies all of the record, there being no evidence, material to a clear understanding of the errors complained of; and the Clerk of the City Court of Atlanta is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the Court of Appeals that the errors alleged to have been committed may be considered and corrected.

This June 18, 1910.

H. M. REID, *Judge.*

3 Due and legal service of the foregoing bill of exceptions and certificate is hereby acknowledged, and all other and further service is waived.

This June 18, 1910.

KING & SPALDING,
J. L. HOPKINS & SONS,
Attorneys for James R. Gray, Defendant in Error.

Filed in office June 18, 1910.
ARNOLD BROYLES, *Clerk.*

GEORGIA,
Fulton County:

I hereby certify, That the foregoing bill of exceptions, hereunto attached, is the true original bill of exceptions in the case stated, to wit: S. Lesser, plaintiff in error, vs. Inman & Co. et al., defendant in error, and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of court affixed this the 28th day of June 1910.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court, Fulton County, Georgia,
ex-Officio Clerk City Court of Atlanta.

4 (Endorsed:) Case No. 2785. Court of Appeals of Georgia. March Term, 1910. S. Lesser v. Gray. Bill of Exceptions. Filed in office June 30, 1910. Logan Bleckley, C. C. A. Ga.

5 City Court of Atlanta, May Term, 1910.

No. 21397.

S. LESSER
vs.
INMAN & COMPANY et al.

To the City Court of Atlanta:

The petition of S. Lesser, a citizen of Augusta, Richmond County, Georgia, respectfully shows:

1. The defendants in this suit are Inman & Company, James R. Gray and Mrs. Frances Jones Inman.

2. Inman & Company is a copartnership, which with reference to the rights of petitioner, a creditor thereof, was, on the 23rd day of July, 1907, the date on which the contract between petitioner and said copartnership, for the breach of which this suit is brought, was entered into, composed of the following persons, to wit: James R. Gray, Mrs. Frances Jones Inman and James F. McGowan, now deceased, his estate being insolvent.

3. James R. Gray is a citizen and resident of Fulton County.

4. Mrs. Frances Jones Inman is a citizen and resident of the State of Virginia, but is the owner of property located in Fulton Co.

5. On July 23, 1907, petitioner, being a merchant of Augusta, Ga., engaged in the business of dealing in cotton bagging, cotton ties and other merchandise, entered into a contract with the defend-
ant, Inman & Company, who were merchants engaged in
6 dealing in and compressing cotton, for furnishing to it all its supply of patches from 500 to 700 bales, for the season beginning September 1, 1907, and ending September 1, 1908. Patches are a form of bagging used in baling cotton. The contract was contained in a letter from petitioner to said defendant in the following terms, towit:

JULY 23, 1907.

Messrs. Inman & Co., City.

GENTLEMEN: I beg to confirm sale to you this day of your supply of patches for the season of Sept. 1st, 1907 to Sept. 1st, 1908, from 500 to 700 bales, the same quality as heretofore, at 2 7/16 cents per pound, delivered compress.

Yours truly,

S. LESSER."

And in an acceptance of the same written under the above signed by the said defendant in the following terms, towit:

Accepted.

INMAN & CO."

6. Up to the 4th day of May, 1908, there had been delivered from time to time by petitioner under said contract and accepted and
paid for by the defendant, Inman & Company, at the con-
7 tract price, one hundred and seventy-six (176) bales of patches, containing 118,090 pounds, and amounting in value to $2,878.44, leaving undelivered of the minimum number stipulated in the contract, five hundred (500) bales, a balance of three hundred and twenty-six (326) bales containing 221,028 pounds, and amounting in value at the contract price to $5,387.55. A bale of patches contains 678 pounds.

7. On the 4th day of May, 1908, a petition in involuntary bankruptcy was filed against the defendant, Inman & Company, alleging that it and each of the persons composing it were insolvent and, within the preceding four months, had committed an act of bankruptcy. On the 25th day of May, 1908, an adjudication in bankruptcy was entered against said James R. Gray and James F. McGowan, and on July 1st, 1909, against Mrs. Frances Jones Inman. Receivers, and afterwards trustees, were appointed for the bankrupt estate.

8. Up to the date of the filing of the petition, or of the adjudication in bankruptcy, no breach of the contract had occurred, nor had the vendees refused, or given notice of a refusal to perform said contract. At the time of the filing of said petition and adjudication, Inman & Company were insolvent and unable to carry out its

contract with petitioner and have remained insolvent and unable to carry out said contract. No demand was made upon petitioner by the defendants, the receivers or the trustees in said case,
8 nor any notice given him that they or either of them desired further delivery under the contract, nor was any delivery or offer of delivery made to the defendants, the receivers or the trustees.

9. Petitioner shows that the defendants have failed under said contract to accept and pay for 326 bales of patches at the contract price, and petitioner having retained said goods, defendants are indebted to him for the difference between the contract price and the market price at the time and place of delivery under said contract.

10. Between May 4, 1908, and September 1, 1908, inclusive, the highest market price reached by patches was one and three fourths (1¾) cents per pound, the same being eleven sixteenth- (11/16) of a cent less than the contract price, which was two and seven sixteenths (2 7/16) cents per pound. For the undelivered portion of the minimum delivery stipulated in the contract, towit, 326 bales or 221,028 pounds, the difference amounts to fifteen hundred and nineteen and 57/100 dollars ($1,519.57) for which sum the defendants are indebted to petitioner, with interest at the legal rate until paid from October 1, 1908, said accounts being due not over thirty days from the date of delivery.

11. On February 17, 1909, a claim was filed in bankruptcy in the District Court of the United States for the Northern Dis-
9 trict of Georgia in said case, based upon the allegations and cause of action set forth in this suit, except that the claim was calculated upon the basis of an undelivered balance of 426 bales instead of 326. A copy of said claim is hereto attached and made a part hereof as exhibit A.

12. On the 8th day of April, 1909, objections to said claim were filed by the trustees. A copy of said objections is hereto attached and made a part hereof as exhibit B.

13. On October 4, 1909, the trustees filed an amendment to said objection, a copy of said amendment is hereto attached and made a part hereof as exhibit C.

14. A statement of the facts relating to said claim was agreed upon between petitioner and the trustees, a copy of said agreement is hereto attached and made a part hereof as exhibit D.

15. On November 5, 1909, after a hearing the Referee in Bankruptcy entered an order disallowing petitioner's claim, and holding same not provable. On January 1, 1910, on review of said order by the said District Court in Bankruptcy, Judge William T. Newman presiding, the order disallowing the claim was approved. A copy of the decision and judgment of said court is hereto attached and made a part here- as exhibit E, except that the agreed statement of facts referred to therein is not set forth, being identical in
10 terms with exhibit D hereof.

16. On July 24, 1908, and on September 7th, 1908 respectively it was ordered by said bankrupt court that the defendants, James R. Gray and Mrs. Frances Inman Jones, having been

duly adjudged bankrupts under the Acts of Congress relating to bankruptcy, and appearing to have conformed to all the requirements of law in that behalf, the said persons be discharged from all debts and claims which were made provable by said acts against their said estates, as individuals and as members of the firm of Inman & Company, composed of James R. Gray, Mrs. Frances Jones Inman and James F. McGowan, and which existed on the 4th day of May, 1908, on which day the petition for adjudication was filed against them, excepting such debts as were by law excepted from the operation of a discharge in bankruptcy.

17. Petitioner shows that his said claim having been disallowed and adjudicated not provable in bankruptcy, the said discharges, of the defendants are no bar to the prosecution of this suit, and the plea of bankruptcy is not available to the defendants.

18. On March 15, 1910, petitioner had issued an attachment against the defendant, Mrs. Frances Jones Inman, on the ground of her non-residence, and on the same day the same was levied by serving process of garnishment on A. W. Stephens, and on March
16, 1910, by serving process of garnishment on J. W.
11 Humphries. Said garnishees at the time of the service of garnishment were both residents of Fulton County and were indebted to said defendant in sums exceeding the amount herein sued for, as evidenced by loan deeds recorded respectively in Deed Books 256, folios 128 and 129, and in Deed Book 271, folio 237 of Fulton County Records. Said attachment was made returnable to the May term, 1910, of the City Court of Atlanta.

19. Petitioner prays judgment against the defendants and each of them in the principal sum of $1,519.57, with interest thereon at the legal rate from October 1, 1908, until paid, said judgment, in the case of Mrs. Inman, to be levied only upon the indebtedness attached by petitioner as alleged in the preceding paragraph; that process issue to the defendants, and petitioner will ever pray, etc.

HENRY A. ALEXANDER,
C. H. & R. S. COHEN,
Petitioner's Attorneys, of Augusta.

12 EXHIBIT A.

In the District Court of the United States for the Northern District of Georgia.

In the Matter of INMAN & COMPANY, Bankrupt.

Bankruptcy.

At Augusta, in the North-Eastern Division of the Southern District of Georgia, on the 16th day of February, 1909, came S. Lesser of Augusta, in the county of Richmond, in said Northeastern Division of the Southern District of Georgia, and made oath and says that Inman & Company, the person against whom a petition for adjudication of bankruptcy has been filed, was, at and before

the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of nineteen hundred and eighty nine dollars ($1,989.00); that the consideration of said debt is as follows: Deponent had sold to said Inman & Company the material for patches covering six hundred bales of patches to be used, during the season of 1907-1908, to be delivered and paid for as needed, that of this amount one hundred and seventy-four bales were delivered, leaving four hundred and twenty-six bales to be delivered, aggregating 289,310 pounds. The loss occasioned by the failure of the said Inman & Company to comply with their contract repre-
13 sented by the difference in the contract price for said patches and the value thereof at the time when they would have been delivered to Inman & Company was eleven-sixteenths (11/16) cents per pound, making the total loss to this date nineteen hundred and eighty nine dollars ($1,989.00); that no part of said debt has been paid; that there are no set-offs or counterclaims to the same; that no judgment has been rendered thereon, and that deponent has not, nor has any person by his order or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

S. LESSER.

Sworn to and subscribed before me, this 16th day of February, 1909.

L. SCARFF,
N. P. R. Co., Ga.

14 Messrs. Inman & Co., City.

GENTLEMEN: I beg to confirm sale to you this day of your supply of patches for the season of Sept. 1st, 1907, to Sept. 1st, 1908, from 500 to 700 bales, the same quality as heretofore, at 2-7.16 cents per pound, delivered compress.

Yours truly,

S. LESSER.

Accepted.
INMAN & CO.

Messrs. Inman & Co. to S. Lesser, Cotton Factors, 816 Reynold St.

To difference in value of 426 bales of patches sold Inman & Co. by S. Lesser on contract dated July 23, 1907, purchased by Inman & Co. from said S. Lesser of their supply of 500 to 700 bales of patches for the season of 1907-8 at 2 7/16 cents per pound, which patches by reason of the failure of Inman & Co. to receive the same at said price, were sold by said Lesser & Co. at 1¾ cents per pound, to the loss to the said S. Lesser of 426 bales, 289,310 pounds
15 at 11/16 equal $1,989.00, as per contract hereto attached.

EXHIBIT B.

In the United States District Court, Northern District of Georgia.

In the Matter of INMAN & COMPANY, Bankrupts.

In Bankruptcy.

In re Proof of Claim S. Lesser, $1,989.

Now comes the Trustees in Bankruptcy and object to the proof of claim filed by S. Lesser, Augusta, Ga., and pray that the same may not be allowed, and your Trustees object to said claim on the grounds:

1. That said claim is not a provable claim in bankruptcy under the provisions of the Bankrupt Act; that said claim on its face shows that at the time of the filing of the petition in said cause, and at the date of adjudication, the merchandise, the subject matter of the claim, had not been delivered to the bankrupts as provided under the contract of sale therein set forth, but that all of said merchandise that had been delivered, towit, the amount of 174 bales had been paid for. That said proof of claim sets up an anticipatory breach of a continuing contract to buy future installments of goods, and as such is not a provable claim in bankruptcy.

16 Said proof shows that at the date of the adjudication, as well as the filing of the petition, no breach of said contract had occurred. It is not shown by said proof that at the date of adjudication or the filing of the petition that the vendee had refused to perform said contract, or that it had given notice of its declination not to carry out the said contract. And your trustees show that the contract set forth is not such a contract as is avoided by an adjudication in bankruptcy, and, therefore, that the same is not a provable debt.

2. Your trustee further shows that the contract states that there is to be supplied 500 to 700 bales, and the proof is based upon a contract of 600 bales, which is an arbitrary selection by the alleged creditor, without justification in law. And your trustees show that in no event, even though such claim be a provable claim, could it be proven for more than the difference between 174 bales and 500 bales, which would leave 326 bales, but your trustees insist that in no event is such a claim a provable claim in bankruptcy.

3. Your trustees show that in any event should such claim be held to be a provable claim that if any damage had occurred to such alleged creditor, which your trustees deny, that the same should be liquidated under the bankrupt act, and that as proven said claim is not entitled to participate without such liquidation should such claim be held to be a provable claim.

17 Wherefore they pray that said claim be not allowed.

W. H. BARRETT,
SLATON AND PHILLIPS,
Attorneys, Trustees.

EXHIBIT E.

In the District Court of the United States for the Northern District of Georgia.

In Bankruptcy.

In the Matter of INMAN & COMPANY, Bankrupt; In re Claim of S. LESSER.

The following statement of facts agreed upon by the counsel for the claimant, and counsel for the Trustee in Bankruptcy, sufficiently shows the matter for determination.

(Here follows statement of facts as set forth in Exhibit D).

I think this case is controlled in principle by the decision recently made here in In re Inman & Company, 171 Fed. Rep., 185. This was an involuntary proceeding in bankruptcy and under the involuntary petition the court seized the property of the bankrupt firm and administered it.

It is agreed that there had been no breach, of the contract prior to the filing of the petition in bankruptcy proceeding. It is also agreed that there has been no tender since the commencement of the bankruptcy proceeding, by S. Lesser of any of the goods to the receivor or trustee. He relies upon an anticipatory breach of the contract caused by the bankruptcy proceeding.

I do not believe that where involuntary proceedings in bankruptcy are instituted, and the bankrupt's business and effects are taken charge of by the court, and administered for the benefit of creditors, that it constitutes such a breach of an executory contract as to authorize proof in bankruptcy for the amount of damage claimed to have been caused by the failure to carry out the contract, nor do I think that any of the cases cited, go to this extent. The closest case to it, probably, is the case of In re Neff, 152 Fed. Rep. 57. The report of this case does not disclose whether it was an involuntary or a voluntary proceeding, probably the latter, from the decision.

The case cited in the opinion In re Inman & Company of Malcomson v. Wappoo Mills, et al., 88 Fed. Rep. 680, if sound, is, I think, conclusive of the question here presented. Judge Simonton, it is true, concedes in his opinion that the question is not free from doubt, but decides as will be seen from an examination of the opinion, to follow the decision of the Court of Appeals of New York, Peoples v. Insurance Company, 91 N. Y. 174. I agree with this view.

The order of the Referee refusing to allow the claim of S. Lesser is approved.

This January 1st, 1910.

WM. T. NEWMAN,
U. S. Judge.

Filed in office March 16, 1910.

W. W. CLARKE,
Dep-ty Clerk.

23 STATE OF GEORGIA,
County of Fulton:

S. LESSER
v.
INMAN & COMPANY, JAMES R. GRAY, and MRS. FRANCES JONES INMAN.

Complaint.

To the Sheriff or His Deputy, of said County, Greeting:

The defendants are hereby required, personally or by attorney, to be and appear at the City Court of Atlanta, to be held in and for said county, on the first Monday in May, 1910, then and there to answer the plaintiff's complaint, as in default thereof said court will proceed, as to justice shall appertain.

Witness the Honorable H. M. Reid, Judge of said court, this 16th day of March, 1910.

W. W. CLARKE,
Dep-ty Clerk.

GEORGIA,
Fulton County:

I have this — served the defendant James R. Gray personally with a copy of the within petition and process.

This March 18th, 1910.

W. L. HAYGOOD,
Dep-ty Sheriff.

24 (*Demurrer.*)

GEORGIA,
Fulton County:

Defendant, James R. Gray, for demurrer to the petition in the above stated case, says as follows:

1. Said petition sets forth no cause of action against this defendant, nor does it set forth any facts which give the plaintiff any legal rights of any kind or character against this defendant.

2. Because there is a non-joinder of parties-defendant said petition disclosing that James F. McGowan was a member of said firm, and because his personal representative has not been made a party to said suit.

3. Because said petition discloses upon its face that in July and September 1908 a formal judgment of discharge was duly entered in the bankruptcy proceedings by the District Court for the Northern District of Georgia, and that said discharge acquits this defendant of any right or claim in favor of the plaintiff, and particularly of the claim asserted in the foregoing suit.

4. Because said petition shows that an adjudication in bankruptcy was had upon an involuntary petition filed against the firm of Inman

& Company, and its members, which said petition was filed on May 4th, 1908, the adjudication thereon being on May 25th, 1908; and that after said adjudication, said firm and its executory contracts of purchase were dissolved and annulled by operation of law—said petition showing that the petition in bankruptcy was an involuntary proceeding, and said petition further disclosing that at the time of the filing of said petition for an adjudication in bankruptcy no breach of said alleged contract had occurred upon the part of said Inman & Company.

5. Because said petition shows that said contract was not performed, and no offer or tender of performance was ever made by the plaintiff to said bankrupt firm, or to the receivers or trustees thereafter duly appointed for said firm.

6. Because said petition shows that the plaintiff's cause of action was presented by him to the bankrupt court in said bankruptcy proceedings, and denied by said court in a final judgment, on January 1st, 1910; and because said petition does not allege that said final judgment was ever reviewed, reversed or set aside—the matters and things connected with said claim being res adjudicata.

7. Because the petition shows that neither said firm nor any member thereof ever violated or breached said contract, and that any breach, or failure to comply with the contract, was due to the adjudication in bankruptcy proceedings; and that said contract, and any liability thereon, was dissolved and discharged by operation of law; and that injury arising therefrom to the plaintiff was, in law, damnum absque injuria.

Wherefore, this defendant prays that said petition may be dismissed.

KING AND SPALDING,
JNO. L. HOPKINS AND SONS,
Def't's Att'ys.

Filed in office March 30th, 1910.

W. W. CLARKE,
Dep-ty Clerk.

(*Order Sustaining Demurrer.*)

This demurrer is sustained and the case dismissed as to the def't, James R. Gray.
June 8th, 1910.

H. M. REID, *Judge.*

STATE OF GEORGIA,
County of Fulton:

I hereby Certify, That the foregoing pages, hereunto attached, contain a true transcript of such parts of the record as are specified in the bill of exceptions and required, by the order of the Presiding Judge, to be sent to the Court of Appeals in the case of S. Lesser, plaintiff in error, vs. Inman & Co. et al., defendant- in error.

I was unable to send up this record in the time prescribed on account of the volume of business in this office.

Witness my signature and the seal of court affixed this the 28th day of June, 1910.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court, Fulton County, Georgia,
ex-Officio Clerk City Court of Atlanta.

28 (Endorsed:) Case No. 2785. Court of Appeals of Georgia, March Term. 1910. S. Lesser vs. Gray. Transcript of Record. Filed in office Jun- 30, 1910. Logan Bleckley, C. C. A., Ga.

29 Court of Appeals of Georgia.

Case No. 2785.

LESSER
v.
GRAY.

By the COURT:

1. An adjudication in bankruptcy against a partnership dissolves the firm and terminates its executory contracts by operation of law. Especially is this true where the adjudication follows involuntary bankruptcy proceedings.

2. Damages are not recoverable against a firm or any member thereof for a failure to perform a contract of the firm for the purchase and acceptance of merchandise to be delivered at designated periods, where the performance of the contract was prevented, not by the act of the buyer, but solely by the bankruptcy law in seizing the assets of the firm and the members thereof under involuntary bankruptcy proceedings. Any damages that may result in such case is, in law, damnum absque injuria.

30 The questions in this case arise on the following statement of facts: A petition in involuntary bankruptcy was filed in the district court for the northern district of Georgia against Inman & Co., of which firm the defendant in error, James R. Gray, was a partner, and an adjudication in bankruptcy followed. The plaintiff in error held an executory contract, made with Inman & Co., for the delivery, at a stipulated price, from time to time as fixed by the contract, of certain bagging material known as "patches," for use in the baling of cotton. The performance of this contract was prevented by the adjudication in bankruptcy, leaving still undelivered, because not then due to be delivered, a large quantity of material. The plaintiff in error, on the theory that the adjudication in bankruptcy was an anticipatory breach of the contract, attempted to prove his claim in the bankruptcy court for the balance that would have been due on the contract but for the bankruptcy proceedings. This claim was disallowed by the referee, and subsequently the judge of the district court rendered a judgment affirming this disallowance. After the rendition of this judgment by the district court, the plaintiff in error, taking the position that inasmuch as his claim had been adjudged by the district court to be one

not provable in bankruptcy, the discharge of the defendant in error as one of the bankrupts could not be pleaded against the
31 same, brought suit in the city court of Atlanta against the defendant in error as a member of the bankrupt firm of Inman & Co., claiming the right to recover against him damages for a breach of the contract which had been made with the bankrupt firm. The petition in the case sets forth fully the entire record of the proceedings in bankruptcy. It was also agreed that up to the date of filing the petition for bankruptcy and the adjudication in bankruptcy, no breach of the contract referred to had occurred, the contract having been performed, according to its terms, up to the date of adjudication, and up to said date neither party had expressed any intention of refusal to carry out the terms of the contract. Neither delivery nor offer of delivery was made of any of the merchandise covered by the contract to the receiver appointed by the court of bankruptcy, nor to the trustee in bankruptcy, nor was any demand made by the plaintiff in error upon the receiver or the trustee for a compliance with the contract, nor any notice given to him by the receiver or the trustee that they expected him to comply with the terms of the contract made with the bankrupt firm. A demurrer to the petition was filed, on the following grounds: (1) That if the plaintiff had a claim, it was acquitted by the judgment of discharge. (2) That having attempted to prove his claim in a court of competent and exclusive jurisdiction, towit, the court of bank-
32 ruptcy, which court had adjudged that his claim was not one which could be proved against the bankrupt estate, and from which judgment he had not appealed, the question was res adjudicata. (3) That any injury which the plaintiff may have sustained is in law damnum absque injuria. The petition in bankruptcy was involuntary. No breach of the contract then existed, and a performance of the contract was rendered impossible, not by the act of the parties, but by the law itself. The contract was dissolved and discharged because the partnership was dissolved and discharged by operation of law.

HILL, *C. J.* (After stating the foregoing facts):

Under the view entertained by this court of the third ground of the demurrer, it will be unnecessary to consider the other two. The Federal decisions are not entirely harmonious on the question here involved. Judge Newman of the United States district court for the northern district of Georgia, in an elaborate and exhaustive opinion, embracing all the authorities on both sides of the question, rendered in re Inman & Co., 171 Fed. 185, concludes that where proceedings in involuntary bankruptcy are instituted, and followed by an adjudication, and the bankrupt is a party to an ex-
33 ecutory contract, the bankruptcy proceedings do not amount to an anticipatory breach of the contract on the part of the bankrupt, but the contract is annulled by operation of law, and the bankrupt discharged from any further liability thereon. A creditor who holds such a contract can prove his debt against the bankrupt estate for any proportionate part which may have been fully per-

formed on the day of the filing of the petition, followed by adjudication. But future earnings under the contract are not provable. The case in which Judge Newman rendered this opinion was that of an employee of a bankrupt firm, who claimed to have the right to prove future earnings under his contract,—that is, which had not been earned at the date of the filing of the petition. Judge Newman held that an adjudication in involuntary bankruptcy against Inman & Co., a partnership, terminated the contract of employment by operation of law, and that the employee of the bankrupts had no claim for damages for breach of the contract, provable against the estate in bankruptcy.

We think that the conflict between the decisions on this subject is more apparent than real. Those decisions which announce the rule accepted by Judge Newman will be found, on examination, to have been cases where the proceedings in bankruptcy were involuntary; and those which hold the contrary view, that the adjudication in bankruptcy does not dissolve or terminate
34 the contractual relations of the bankrupt as to executory contracts, will be found to have been cases in which the bankruptcy proceedings were voluntary, it being held in this class of cases that if the proceedings are voluntary, the machinery of the law was set in motion by the bankrupt himself and for his own benefit, and therefore he could not be allowed to sever his contractual relation by his voluntary act. But where the proceedings are involuntary, forced upon the bankrupt apparently against his will by his creditors, the existing contractual relations are not then severed by his own act, but are discharged entirely by the operation of the law itself. The decision by Judge Newman, supra, is in no respect different in principle from the one now under consideration. In that case an employee of the bankrupt firm had a contract of employment with the firm for a stipulated period. In the present case the plaintiff in error had a contract with the bankrupt firm to deliver articles of merchandise to the bankrupt firm for a stipulated price and during a stipulated period. In the first case the bankrupt was to pay for the services when rendered; and in the second case, for the merchandise when delivered. In neither case was there any breach of the contract by the bankrupt when the petition was filed in bankruptcy, and Judge Newman places his decision, following the great number of cases which he cites, solely upon the ground that the partnership and its executory contracts are dissolved by op-
35 eration of law, where the adjudication is had upon involuntary proceedings. To use his own language: "The adjudication in bankruptcy ends all such contracts (referring to executory contracts). Of course, proof may be allowed for any amount due prior to the institution of the proceedings in bankruptcy. It is provided by the bankruptcy act that for most personal services the employee would have priority for any amount due him for as much as three months preceding the bankruptcy proceedings. This fact of priority of payment for three months extending to so large a class of employees is another reason why I believe it was the intention, in passing this act, that such contracts should terminate with

the adjudication in bankruptcy. All this is certainly true as to a partnership. The adjudication dissolves it by operation of law, and that dissolution ends all its liabilities except such as are expressed in the act." It is well settled that whatever may be the rule as to cases of individual bankrupts, a partnership is dissolved by bankruptcy proceedings against it. 22 Am. & Eng. Enc. Law (2 ed.), 202; 30 Cyc. 654, and many cases cited in the notes. If this be true, it would follow, as an inevitable corollary, that the firm being dissolved by operation of law, all of its executory contracts are ended. A case strictly analogous in principle, as well as on the facts, to the instant case is that of Malcomson v. Wappoo Mills, 88
36 Fed. 680, where Judge Simmonton held, that damages are not recoverable against a corporation for its failure to perform a contract for the sale and delivery of merchandise, where performance was prevented solely by the action of a court in appointing a receiver for the corporation, and enjoining all others from interfering with its business or property. In such case the breach of contract is damnum absque injuria. The principle here announced, we think, is applicable as well to a partnership as to a corporation. In the case of Bailey v. Loeb, 2 Fed. Cases, 376, Circuit Judge Woods, who was afterwards Justice of the Supreme Court, says, in discussing the point now under consideration: "For instance, a business man has a manager or bookkeeper hired by the year, at a salary payable quarterly. At the end of two months he is adjudged a bankrupt. His manager or bookkeeper may prove for a proportionate part of his salary up to the time of the bankruptcy, but he cannot prove for any part that may accrue and fall due after the bankruptcy. The clear purpose of the bankrupt act is, to cut off all claims for rent to accrue, or for services to be rendered, after the date of the bankruptcy." The universal rule announced by the Federal Courts in rent cases, that where a landlord seeks to prove his claim for unearned rental instalments, represented by a written contract with the tenant, he can not recover for future stipulated rentals, is
37 applicable to the present case. In other words, the relationship of landlord and tenant ceased by operation of law upon the adjudication in bankruptcy. In re Jefferson, 93 Fed. 948; In re Cobb, 100 Fed. 207. In his decision affirming the judgment of the referee in disallowing the claim of plaintiff in error against the bankrupt estate, Judge Newman expressly holds that damages can not be recovered by the seller for the buyer's alleged breach of the executory contract of sale, resulting solely from the buyer's involuntary bankruptcy. In re Inman & Co., 175 Fed. 312. As before stated, we think the principle here announced is supported by the greater weight of authorities and is clearly in harmony with the purpose of the bankrupt act. The bankrupt act takes possession of all the bankrupt's property, both vested and contingent, for the benefit of his creditors. With the exceptions noted in the act itself, and which we think are exhaustive, a discharge in bankruptcy relieves the bankrupt of all of his obligations of every character, subject to the option of the trustee to assume them for the benefit of the bankrupt estate. The relief granted by the act to an honest bank-

rupt is co-extensive with his surrender of all his property and his property rights. "He is entitled to face whatever the future may contain, at least free from all honest obligations, and if he carries no assets into the future, he likewise carries no burdens."

38 The able counsel for plaintiff in error insists that the view herein announced is contrary to the express terms of the bankrupt act. He contends that only those debts which are provable against the bankrupt estate are those from which the bankrupt is protected by his discharge, and that since it has been held in this case by Judge Newman, at the instance of the bankrupt of trustee, that the claim of the plaintiff is not provable, and therefore not entitled to participation in the bankrupt's estate, it is in no way affected by the subsequent discharge of the bankrupt, and therefore, in this suit, a plea of such discharge is no defense. It is unquestionably true, as declared by the very terms of the bankrupt act itself and by many decisions of the courts, that "only provable debts are dischargeable (Collier on Bankruptcy (7th ed.), 312); and it is earnestly insisted that participation by the creditor in the bankrupt's estate is an essential prerequisite to a discharge of the bankrupt from the creditor's claim or debt, and that it would be unjust to deny a creditor the right to participate in the assets of the estate, and also deny him the right to sue elsewhere. Section 17 of the bankruptcy act is as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except," etc. And it is contended that the inevitable implication from this language is that if debts are not provable, they are not dischargeable.

39 We think the contention of learned counsel is sound within proper limitation. The language of the act which is quoted refers expressly to "provable debts,"—debts which existed on the filing of the petition in bankruptcy, followed by an adjudication. Section 63*a* of the bankruptcy act of 1898 provides for debts which may be proved; which, among others, are: "(1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date * * * (4) founded upon an open account, or upon a contract, express or implied." The contract in the present case did not constitute a fixed liability absolutely owing by the bankrupt at the time of the filing of the petition against him. It is admitted that at that time there was nothing due on the contract. It had been partially performed by both parties thereto, up to that date. It was therefore a contingent liability against the bankrupt. If there had been no bankruptcy proceedings, it might never have been breached by the bankrupts. It might have been broken by the plaintiff in error. There are many contingencies that might have prevented the contract from becoming a fixed debt against the firm of Inman & Co., or any member thereof. The Supreme Court of the United States, in the case of Dunbar v.

40 Dunbar, 190 U. S. 340 (23 Sup. Ct. 757, 47 L. ed. 1084), holds that § 63*a* of the bankruptcy act is not broad enough to include contingent liabilities of any character. Mr. Justice Peck-

ham, speaking for the court, says: "We do not think that by the use of the language in § 63*a* it was intended to permit proof of contingent debts or liabilities or demands the value or estimation of which it was substantially impossible to prove." As we have seen in the former part of this opinion, the adjudication in bankruptcy did not constitute an anticipatory breach of the executory contract, and therefore such contract did not constitute an existing debt absolutely owing against the bankrupt, which could be proved, and from which he was discharged. It was simply a contingent liability, which was discharged by operation of law on the filing of the involuntary petition, followed by adjudication. In other words, it was not a debt then existing against the bankrupt estate, and the argument of learned counsel on this line is not applicable to executory contracts of this character.

In our opinion, the judgment of the trial court sustaining the demurrer and dismissing the petition should, for the reasons above stated, be affirmed.

Judgment affirmed.

41 Court of Appeals of the State of Georgia.

ATLANTA, *January* 24, 1911.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

S. LESSER
v.
JAS. R. GRAY.

This case came before this court upon a writ of error from the city court of Atlanta, and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Bill of costs, $10.00.

42 *Writ of Error.*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Georgia, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Simon Lesser and James R. Gray, wherein was drawn in question the validity of a treaty or statute, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution,

or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Simon Lesser, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme
43 Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 11th day of January, in the year of our Lord one thousand nine hundred and thirteen.

[Seal U. S. District Court, N. D. Georgia.]

O. C. FULLER,
Clerk District Court United States,
Northern District of Georgia.

Allowed, Jan'y 11th, 1913.
BENJ. H. HILL,
Chief Judge, Court of Appeals of Georgia.

Filed in office January 16, 1913. Logan Bleckley, clerk Court of Appeals of Ga.

44 *Citation.*

THE UNITED STATES OF AMERICA:

The President of the United States to James R. Gray, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Court of Appeals of the State of Georgia, wherein Simon Lesser is plaintiff in error and you are defendant in error, to show cause, if any there by, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Judge of the Court of Appeals of the State of Georgia, this 11th day of January, 1913.

BENJ. H. HILL,
Chief Judge, Court of Appeals of Georgia.

Attest:

____ ____,
Clerk Court of Appeals of Georgia.

Filed in office January 16, 1913.

LOGAN BLECKLEY,
Clerk Court of Appeals of Ga.

45 ATLANTA, GEORGIA, *Jan. 13th*, 1913.

We, attorneys of record for the defendant in error in the above entitled case, hereby acknowledge service of the above citation, and without entering an appearance in the Supreme Court of the United States & with a reservation of all rights.

KING & SPALDING & UNDERWOOD,
CHAS. T. & L. C. HOPKINS,
Attorneys for James R. Gray.

Filed in office January 16, 1913.

LOGAN BLECKLEY,
Clerk Court of Appeals of Ga.

46 Court of Appeals of the State of Georgia.

No. 2785.

SIMON LESSER, Plaintiff in Error,
vs.
JAMES R. GRAY, Defendant in Error.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Court of Appeals in rendering judgment against him on January 24, 1911, in the above entitled case, the plaintiff in error hereby prays a writ of error, from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a bond for costs.

An assignment of errors is filed herewith.

HENRY A. ALEXANDER,
Attorney for Plaintiff in Error.

Filed in office January 16, 1913.

LOGAN BLECKLEY,
Clerk Court of Appeals of Ga.

47 STATE OF GEORGIA,
Court of Appeals:

Let the writ of error issue upon the execution of a bond by Simon Lesser to James R. Gray, in the sum of five hundred dollars.

January 11th, 1913.

BENJ. H. HILL,
Chief Judge Court of Appeals of Georgia.

Filed in office January 16, 1913.

LOGAN BLECKLEY,
Clerk Court of Appeals of Ga.

48 *Assignment and Prayer.*

Court of Appeals of Georgia.

No. 2785.

SIMON LESSER, Plaintiff in Error,
vs.
JAMES R. GRAY, Defendant in Error.

Assignment of Errors.

Now comes the above plaintiff in error and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignments:

In prosecuting his suit in the City Court of Atlanta in which court it was filed and made returnable to the May Term, 1910, of said court, and in prosecuting the same in the Court of Appeals of Georgia, the plaintiff, who is the plaintiff in error in this writ, specially set up and claimed a title, right, privilege and exemption under the statutes of the United States relating to bankruptcies, towit, the act approved July 1, 1898, and the subsequent acts
49 amendatory thereof, and claimed that his debt having been disallowed and adjudicated by the bankruptcy court to be not provable in bankruptcy against the assets of the bankrupt, the proceedings in bankruptcy and the discharge of the defendants were no bar to the prosecution of his suit, and that the plea of bankruptcy was not available to the defendants.

Said claim was expressely overruled and denied by a final judgment of the Court of Appeals of Georgia rendered January 24, 1911, on appeal from the judgment of said City Court.

Said judgment of the Court of Appeals of Georgia was a decision against the title, right, privilege and exemption specially set up and claimed as aforesaid under said statutes by the plaintiff in error.

Said judgment of the Court of Appeals of Georgia was error because:

First. Said judgment was contrary to the constitution and statutes of the United States and contrary to law.

Second. Said judgment decided and adjudicated that, notwithstanding the claim of the plaintiff in error against the estate of the bankrupt partnership had been affirmatively adjudicated by the court of bankruptcy in which said proceedings in bankruptcy were pending to be not a provable claim against said estate, never-
50 theless the claim of plaintiff in error was ended, invalidated and destroyed by the proceedings in bankruptcy, and that plaintiff in error was prevented and barred by said proceedings in bankruptcy from subsequently enforcing his claim against the bank-

rupt partnership or the individual members thereof in a court of general jurisdiction.

Third. Said judgment was error in holding and deciding that although his claim had been adjudicated to be not provable in bankruptcy, the said claim was barred, defeated and destroyed by operation of the bankruptcy laws of the United States, upon the filing of the involuntary petition followed by adjudication.

Fourth. Said judgment was error because it held and decided that the bankrupt partnership against which the claims of plaintiff in error existed, was dissolved by operation of the bankruptcy laws of the United States and the proceedings thereunder, and that said partnership having been so dissolved, all of its executory contracts, including that of the plaintiff in error, were ended. Plaintiff in error says that this judgment was error because, while said proceedings in bankruptcy may have dissolved said partnership, they did not end its contracts, or terminate its liabilities thereon, or discharge the members of said partnership from the liabilities thereof unless said liabilities under said contracts were provable in bankruptcy, and the partnership and its members secured a discharge.

51 Fifth. Said judgment was error because it was contrary to subsection 12 of section 1 and to section 17 of the United States Bankruptcy Law enacted July 1, 1898, and the amendments thereto and was further contrary to the general plan and purpose of said bankruptcy laws.

For which errors the plaintiff in error, Simon Lesser, prays that the said judgment of the Court of Appeals of Georgia dated January 24, 1911, be reversed and a judgment rendered in favor of the plaintiff in error and for costs.

HENRY A. ALEXANDER,
Attorney for Simon Lesser, the Plaintiff in Error.

Filed in office January 16, 1913.

LOGAN BLECKLEY,
Clerk Court of Appeals of Ga.

52 SIMON LESSER, Plaintiff in Error,
v.
JAMES R. GRAY, Defendant in Error.

Bond.

Know all men by these presents, that we, Simon Lesser as principal and D. Nachman as surety, are held and firmly bound unto James R. Gray in the sum of five hundred dollars, to be paid to the said James R. Gray, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 11th day of January, 1913.

Whereas, the above-named plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Georgia.

Now, therefore, The condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

SIMON LESSER, *Principal.* [L. S.]
D. NACHMAN, *Surety.* [L. S.]

53 STATE OF GEORGIA,
Richmond County:

D. Nachman being duly sworn, on oath deposes and says that he is of lawful age and is a citizen of the State of Georgia, knows the contents of the foregoing instrument to which he has attached his name, and that he is worth the sum of five hundred dollars over and above all debts, liabilities and exemptions.

D. NACHMAN.

Sworn to and subscribed before me this January 9th, 1913.
[SEAL.] ADOLPH LESSER,
Notary Public, Richmond County, Georgia.

My commission expires Jan. 5, 1916.

Bond approved. Dated January 11th, 1913.
BENJ. H. HILL,
Chief Judge Court of Appeals of Georgia.

Filed in office January 16, 1913.
LOGAN BLECKLEY,
Clerk Court of Appeals of Ga.

54 Court of Appeals of Georgia.

No. 2785.

SIMON LESSER, Plaintiff in Error,
v.
JAMES R. GRAY, Defendant in Error.

Præcipe.

To the Clerk of the Court of Appeals of Georgia:

The plaintiff in error directs that you incorporate the following portions of the record of the above stated case in the transcript of the record to be transmitted to the Supreme Court of the United States in pursuance of the writ granted in the above case, towit:

1. The bill of exceptions in the Court of Appeals.
2. The transcript of the record in the Court of Appeals.
3. The opinion and judgment in the Court of Appeals.
4. The original writ of error, the citation and the acknowledgment of service by the attorneys for the defendant in error.

5. Copies of the petition for writ of error; order allowing the writ of error; the bond given by the plaintiff in error; the assignment of error; and this præcipe.

HENRY A. ALEXANDER,
Attorney for Plaintiff in Error.

55 GEORGIA,
Fulton County:

The undersigned attorneys for James R. Gray, the defendant in error in the above writ of error acknowledge service this day of the foregoing præcipe, without prejudice to any rights. This January 16, 1913.

KING & SPALDING & UNDERWOOD,
CHAS. T. & L. C. HOPKINS,
Attorneys for Defendant in Error.

Filed in office January 16, 1913.

LOGAN BLECKLEY,
Clerk Court of Appeals of Ga.

56 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *January* 21, 1913.

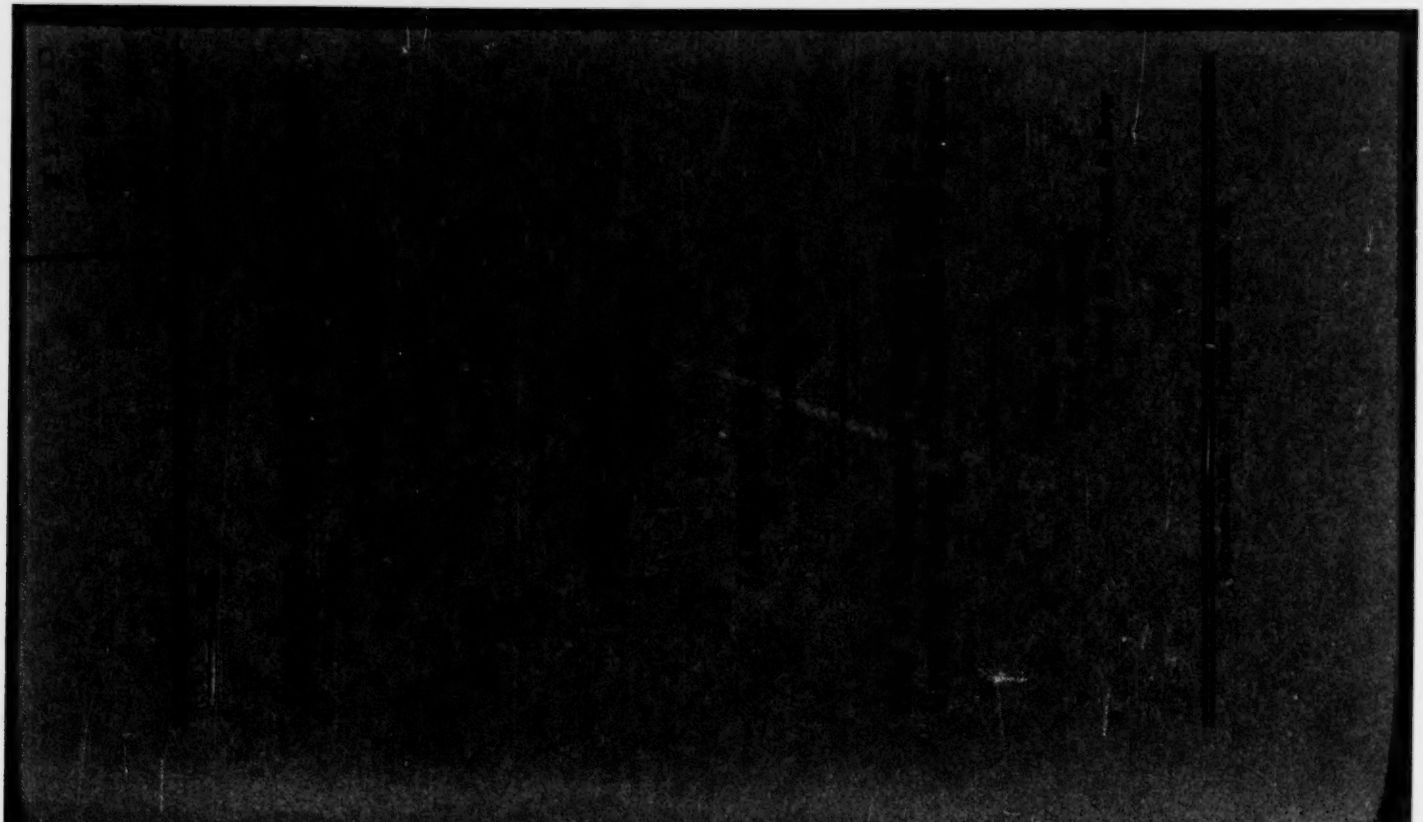
I hereby certify that the foregoing pages hereto attached contain the original writ of error and citation, together with a true and complete transcript of those parts of the record in the case of Simon Lesser, plaintiff in error, v. James R. Gray, defendant in error which are required by the præcipe of the plaintiff in error to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

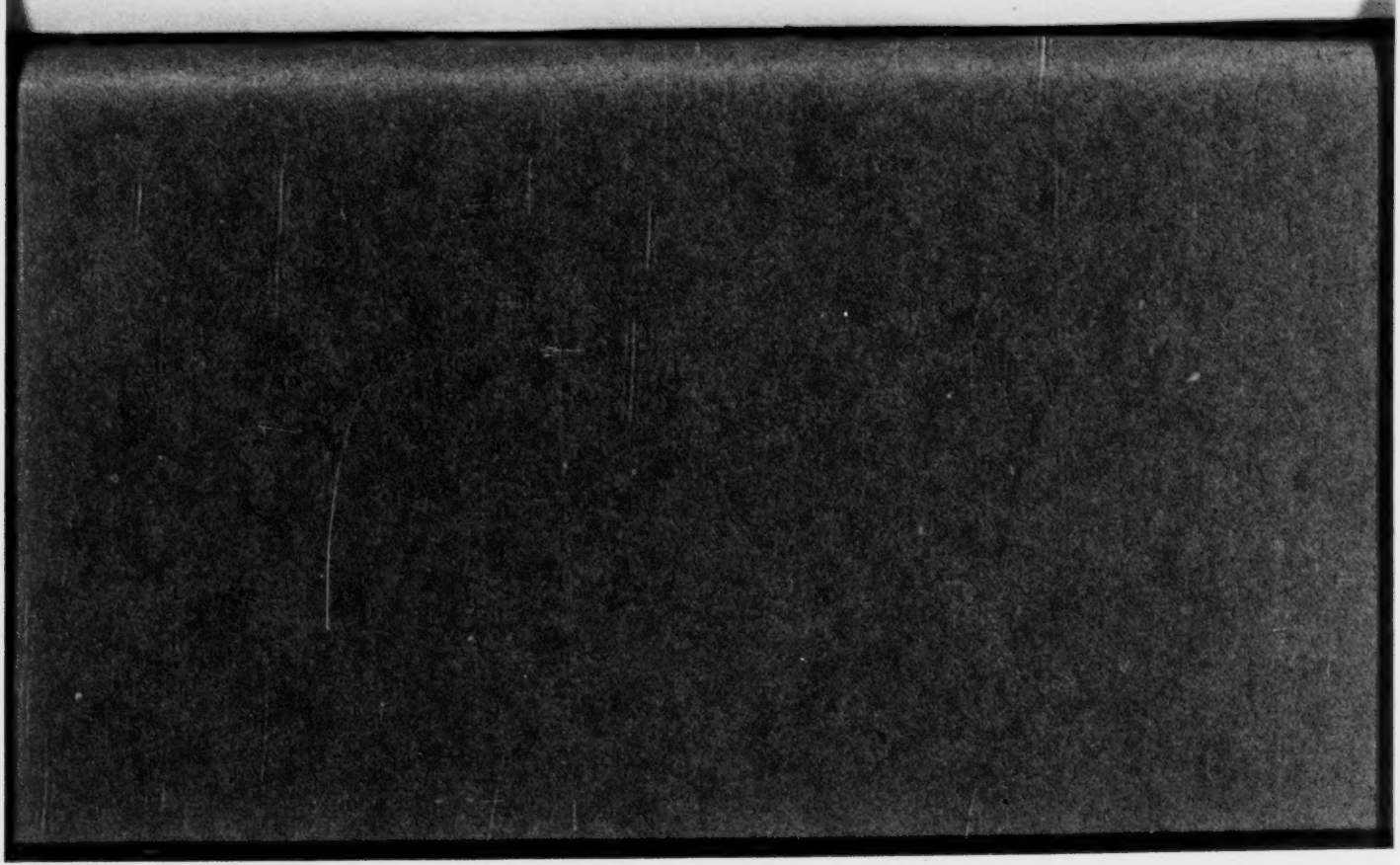
Witness my signature and the seal of the Court of Appeals of Georgia hereto affixed, the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY, *Clerk.*

Endorsed on cover: File No. 23,527. Georgia Court of Appeals. Term No. 443. Simon Lesser, plaintiff in error, vs. James R. Gray. Filed January 28th, 1913. File No. 23,527.





SUBJECT INDEX.

CASE INDEX.

STATEMENT OF CASE.

This was a suit brought in the City Court of Atlanta, Georgia, by Simon Lesser against Inman & Company, James R. Gray and Mrs. Frances Jones Inman, to recover for the alleged breach of the anticipatory contract hereinafter set forth.

The suit in the City Court alleged that the partnership, Inman & Company, was composed of James R. Gray, Mrs. Frances Jones Inman and James F. McGowan, deceased; that a petition in involuntary bakruptcy was filed against the partnership and the three partners which was subsequently followed by judgments of discharge in favor of James R. Gray and Mrs. Frances Jones Inman as individuals and as members of the partnership of Inman & Company.

That prior to the filing of the involuntary petition, Lesser, plaintiff in error here, had entered into a written contract with Inman & Company for the sale of certain patches covering the season beginning September 1, 1907, and ending September 1, 1908, at a stipulated price per pound; that under this contract the plaintiff in error had furnished a certain quantity of patches and received full payment therefor. At the date of the filing of the petition in bankruptcy no patches had been delivered by the plaintiff in error for which he had not been paid. No patches had thereafter been ordered under said contract by the trustee in bankruptcy, nor had any been tendered by plaintiff in error.

Plaintiff in error intervened in the bankruptcy case seeking to prove a claim which alleged that the market price of patches was less than the contract price, and that he was entitled to recover out of the assets of the bankrupt estate the difference between the market price and the contract price for the undelivered patches.

The claim was resisted by the trustees. Among other objections lodged were the following: That the merchandise, the subject-matter of said claim, had not been delivered to the bankrupt. That the claim set up an anticipatory breach of the continuing contract to pay future instalments of goods and was not a provable claim. That no breach of the contract had been shown, and that the amount claimed to be due in the proof of claim was not due and owing at the date of the bankruptcy nor at the date of the adjudication; and because the plaintiff in error's claim was not a fixed liability absolutely owing either at the date of the filing of the involuntary petition or at the date of the adjudication in bankruptcy. (Transcript, pp. 7 and 8.) A stipulation as to the facts was made, and the cause submitted to the referee, who disallowed the claim. Exceptions were overruled by Hon. William T. Newman, Judge of the District Court. No appeal was entered to this judgment.

Thereafter this suit was brought in the City Court of Atlanta. The personal representative of James F. McGowan was not made a party. Attachment was issued against property of Mrs. Frances Jones Inman, she being a non-resident. James R. Gray was served with process.

James R. Gray demurred upon the grounds, substantially:

1st. That the petition set forth no cause of action.

2nd. Because there was a non-joinder of parties-defendant in that the personal representative of Mr. McGowan was not made a party.

3rd. Because a formal judgment of discharge had been entered in favor of said Gray which acquitted him of the claim asserted.

4th. Because the contract set forth in the petition was an executory contract, and that the firm of Inman & Company was dissolved by the involuntary petition in bank-

ruptcy, thereby annulling the contract; and because the petition of the plaintiff in error showed that no breach of the contract for the purchase of the patches had occurred upon the part of Inman & Company.

5th. Because the petition disclosed that the contract was not performed and no offer or tender of performance was made by the plaintiff.

6th. Because plaintiff had intervened in the bankruptcy proceedings, asserting the same claim, and that the Federal Court had rendered a final judgment, which was res adjudicata.

7th. Because the petition showed that neither the firm nor any member thereof had breached the contract with the plaintiff in error, and any failure to comply with the contract was due to the adjudication in the involuntary bankruptcy proceedings, and thereby said contract and all liability thereon was discharged by operation of law. (Transcript, pp. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.)

BRIEF OF LAW.

The demurrer contains seven grounds. The trial judge, Honorable H. M. Reid, sustained the demurrer in its entirety. The Court of Appeals considered but one ground of the demurrer — that an adjudication in involuntary bankruptcy terminates the executory contracts of a partnership by operation of law; and, restating this proposition in somewhat different verbiage, that damages could not be recovered against a partnership, or its members, upon an executory contract where the assets of the firm had been seized by the bankrupt court, and that any damage which resulted was damnum absque injuria.

But the judgment rendered was one of unconditional affirmance of the judgment of the lower court. The Court of Appeals did not hold that the demurrers considered by the trial court were all unsound except as to the ground considered by the appellate court.

If the ground determined to be good by the appellate court was erroneously so declared, it would not follow that there had been any specific ruling made with reference to the other grounds of the demurrer. The Court of Appeals of Georgia has not decided that one or two grounds of the demurrer were sound and the others unsound. As the judgment of that court was one of general affirmance, the judgment of the trial court is endorsed and approved without any manner of qualification. We do not see how, if this honorable court should determine that the one conclusion stated by the Court of Appeals was incorrect, that it would result in altering at this time the general judgment of ffirmance. This result might have followed if the Court of Appeals had specifically adjudged that all of the grounds of the demurrer were unsound except a particular ground, and the judgment of that court was reversed by this court as to that particular ground. But reversing that court as to this particular ground will leave the judgment of the trial court affirmed as to all of the other grounds.

We do not think the present case involves the construction of any section of the bankrupt act, and respectfully submit that this honorable court is without jurisdiction to entertain the writ of error.

Judge Newman, upon the presentation of the claim filed by the plaintiff in error, declined to allow it upon the ground that an executory contract was involved; that the partnership of Inman & Company had been dissolved by operation of law, and that this dissolution ended all executory contracts.

This position was followed by the Court of Appeals of the State of Georgia, and again it was held that no lia-

bility existed upon the contract because it had been abrogated by an act of the law.

The decision is of precisely the same character as that involved in the case of McElheney, et al. vs. Jasper Trading Company, 12 Ga. App. 790, this being one of insolvency proceedings brought under the State insolvency laws, and not under the Federal act.

It is also alike in principle to the case of Grice vs. Swift, 82 Ga. 393, where an executory contract with a partnership was cancelled by the death of one of the partners.

Any contract of an executory nature is annulled by vis major whenever the ability of the contracting parties to perform is taken away by a force over which they have no control. This is a rule which, as we understand it, applies to all manner of contracts; and there is written into every agreement to do particular things in the future the implied condition that if performance is prevented by an act of God or the law, the contracting party is absolved.

A common carrier of goods is an insurer; its obligation is absolute in appearance; it must either deliver the goods or pay the fair price thereof. Yet even this contract of insurance has certain well known exceptions. If Providence intervenes and prevents the performance, the obligation to deliver in safety or to pay the fair price no longer exists. If the goods are taken from the carrier by the public enemy, the same cessation of liability arises.

Clearly the executory contracts of a partnership are generally exonerated under the law by the death of one of the partners. Clearly where vis major is represented by the law itself, the same result follows. A contract of partnership to manufacture and sell intoxicating liquors is ended where the State subsequently, in the exercise of its police power, forbids that business. An executory contract for the solicitation and sale of intoxicating liquor made with a drummer would be ended by the passage of a similar act.

It was at one time lawful in Georgia to operate a lottery. A contract to conduct this business—an agreement for employment the object of which was to sell lottery tickets, would be finally terminated by the enactment of a law which prohibited the business.

Any act of the law itself which prevents performance has precisely the same effect.

The seizure of the business and assets of Inman & Company by the Federal court was an act of vis major. It prevented Inman & Company from complying with any contract then in existence, simply because it took from the firm all of its assets, all of its resources, and put it beyond its power to comply.

But this does not present for construction any Federal statute. If the Federal court had acted through its ordinary equitable jurisdiction, and had, under a deed of trust to secure bonds, appointed a receiver for the purpose of marshaling the assets of the insolvent, the result would have been precisely the same. If either Federal or State court had taken possession of the assets of the firm for the purpose of administration for any recognized ground of equitable jurisdiction, but wholly independent and irrespective of the bankrupt act, the same result would have followed.

The point presented is, that the contract was terminated by vis major. It makes no difference what particular phase of vis major occurred; any manifestation of that supreme power produced the same result. If bankruptcy proceedings had not been instituted, the death of Mr. McGowan, which occurred shortly after the institution of the proceedings, would have terminated the contract just as effectually as did the filing of the involuntary petition in bankruptcy.

If this is correct, then the question presented is not, whether a particular section of the bankrupt act should be so construed as either to admit or non-admit a certain claim to proof, nor whether the section with reference to the scope of a discharge should be construed broadly or narrowly; the true question involved is, whether upon

the happening of any event falling within the domain of superior power, the contract would continue in life.

The mere fact that in this case the superior power was represented by setting in operation the Federal act does not create a Federal question. If the phase of superior power is represented by a court's seizing the assets of a firm for the purpose of administration, then that phase would be presented whether the proceedings originated in the Federal court or the State court, and without any reference to whether there would be, under either, a discharge granted. Under the State insolvency laws, no discharge is granted; and yet a proceeding under those laws would present this particular phase of superior power, and the results reached by Judge Newman and the State Court of Appeals would be the same.

So we very earnestly insist that the question of liability by the defendants in error to the plaintiff in error does not involve any consideration of the sections of the bankrupt act relative to discharge, and no ruling was made by the State Court of Appeals, or can be made by this Honorable Court, which will in itself put forth any new, or repeated construction of these sections, or of any other section of the bankrupt act.

Even when the attempt to prove the claim was originally made in the bankruptcy proceedings, no federal question was truly presented; and Judge Newman correctly placed his decision upon a principle of general law which would have been invoked and rendered if the bankruptcy law had been repealed.

The ruling that an adjudication in bankruptcy dissolved this partnership and terminated the contract involved no construction of the Constitution of the United States or of the bankrupt act and its amendments. It was an application of general principles of law to the state of facts produced by the adjudication of bankruptcy **in invitum** against this partnership.

The State court would have ruled the question correctly if the bankrupt court had seized the assets and had administered them speedily, and, pending the ap-

plication of the partners for a discharge, the act had been repealed without preserving pending and unfinished administrations, and without permitting bankrupts to obtain a discharge from their existing debts, even though their estates had been wholly or partially administered.

Under the earlier bankruptcy acts both of England and America the bankrupt was not absolved from his debts. His property was administered but his obligations were left intact. The first provision for a discharge is contained in our act of 1841.

Suppose this case had arisen under any bankruptcy act prior to 1841. The defendant in error would not have been discharged from his debts, but the same result which now obtains would then have been reached. He would have been released from all executory contracts by the act of the law in taking over all of his property, and no federal question would have been presented.

A casual inspection of the statement of facts prepared by Chief Judge Hill, in determining the case in the Court of Appeals, will show that in the opinion of the Court of Appeals there was no federal question involved.

The demurrer as filed contained seven different grounds. Judge Hill consolidates these into three grounds, as follows: (1) That if the plaintiff had a claim, it was acquitted by the judgment of discharge. (2) That having attempted to prove his claim in a court of competent and exclusive jurisdiction, to-wit, the court of bankruptcy, which court had adjudged that his claim was not one which could be proved against the bankrupt estate, and from which judgment he had not appealed, the question was res adjudicata. (3) That any injury which the plaintiff may have sustained is in law damnum absque injuria. The petition in bankruptcy was involuntary. No breach of the contract then existed, and a performance of the contract was rendered impossible, not by the act of the parties, but by the law itself. The contract was dissolved and discharged, because the partnership was dissolved and discharged by operation of law.—8 Ga. App. 606. 607. (Transcript of Record, p. 14.)

The Court of Appeals considered only the third ground as stated by them, as is evidenced by the first sentence in the opinion, as follows: "Under the view entertained by this Court of the third ground of the demurrer, it will be unnecessary to consider the other two.—8 Ga. App. 607. (Transcript of Record, p. 14.)

The Court of Appeals of Georgia thus very clearly indicates the ground of the demurrer which it thought was controlling, and expressly states that no other ground is considered. The ground which the Court did consider is clearly stated to be one which involves no construction of any federal statute or clause of the federal constitution.

The cases cited in the opinion of the Court of Appeals of Georgia show that the only question considered by the Court was that involved in the third ground of the demurrer as specified by the Court, and that the decision rests upon the one legal proposition, that where a partnership is dissolved by bankruptcy, this dissolution terminates all executory contracts. On page 609 (Transcript of Record, p. 16), the court cites two text books in support of the principle announced: 22 A. & E. Enc. of Law 202 and 30 Cyc. 654, with several decisions of the Federal Court.

Judge Hill states that in the event bankruptcy proceedings had not been instituted, all of the patches might have been delivered and paid for, or that the contract might have been broken by the plaintiff in error, and that there were many contingencies which might have prevented the claim from becoming a fixed debt against Inman & Company or any of its members.

Unearned or unaccrued instalments of a contract present no fixed existing debts against the bankrupt.

In re Jefferson, 93 Fed. 948.
In re Bray vs. Cobb, 100 Fed. 270.
In re Merrill & Baker, 186 Fed. 312, 314.
In re American Vacuum Cleaner Co., 192 Fed. 939, 940.
In re Hays, Foster & Ward Co., 117 Fed. 879.

In this case there has been no decision by the State Court against any title, right, privilege or immunity claimed under the constitution or any treaty, statute, commission or authority of the United States. Analyzed the position of the plaintiff in error is as follows:

He sets up that he has a claim for anticipatory damages upon a contract made with Inman & Company, a firm of which the defendant in error is a member.

So far as the right upon which he bases his suit is concerned, his entire claim is his rights, as they existed prior to the institution of the proceedings in bankruptcy, have not been defeated by such proceedings.

He is not claiming that such proceedings in bankruptcy have conferred any right upon him which he did not possess before their institution.

His allusions to the proceedings in bankruptcy are in the nature of a special replication to an anticipated plea in bankruptcy and an attempt to show in advance that a plea setting up proceedings in bankruptcy would be unavailing. This is shown by the seventeenth paragraph of his petition in which he states: "The said discharges of the defendants are no bar to the prosecution of this suit, and the plea of bankruptcy is not available to the defendants."

The jurisdiction of the Supreme Court of the United States to review a decision of a State Court does not exist in all cases where a federal question is involved.

Where the State Court affirms and allows the title, right, privilege or immunity set up under the federal authority, its decision is final and no writ of error lies thereto.

It is only where one of the parties sets up a title, privilege, right, claim or immunity under some Federal authority and the decision is adverse to the claim thus set up, that the right to review such decision on writ of error is conferred upon the Supreme Court of the United States.

Missouri vs. Adriano, 138 U. S. 496, 500.

3rd Foster's Fed. Practice (4th Ed., Sec. 500, p. 2000).

Therefore where suit is brought against a party and he files a plea of bankruptcy setting up his discharge and the plea is sustained, the plaintiff cannot maintain a writ of error to the Supreme Court of the United States, as the decision has been in favor of the claim set up under the Federal authority.

Linton vs. Stanton, 12 How. 423.
Smalley vs. Laugenour, 196 U. S. 93.

The statement that the plaintiff attempted to prove his claim in the bankruptcy court and that the same was repelled as not provable, is not the statement of any right, title or immunity arising out of any authority of the United States. There is no averment of any decision of the court of the United States setting up that plaintiff had a claim which was not discharged in bankruptcy, nor any decision upon the merits of his contention that the effect of the bankruptcy proceedings was not to destroy an executory contract so far as anticipatory damages were concerned.

The decision of the Federal Court was a decision denying rights, and not a decision conferring them. Even if it is not res adjudicata against the plaintiff, in every particular, it does not adjudge anything in his favor, but at most leaves him to set up thereafter the claims arising out of his contract, with the right to the defendant to set up the effect in his favor of the bankruptcy proceedings.

This the defendant has done by his demurrers and on such demurrer the right set up by him as arising under the bankruptcy proceedings in his favor has been sustained.

The latest case which we have found in which it was sought to review the decision of the Supreme Court of a State, upon the ground that a federal statute was involved, and in which this Honorable Court held that the decision was predicated upon a general equitable principle and was therefore not reviewable by this Court,

is the case of Holden Land & Live Stock Company vs. The Interstate Trading Company, reported in 233 U. S. 536—34 S. C. R. 661.

In this case certain conveyances appeared to be absolute upon their face. A bill was filed praying that the conveyances be declared mortgages and that a redemption should be permitted. It was held that a judgment granting this prayer was final and the jurisdiction would not be entertained of a writ of error thereto because the bill also alleged that the creditor, which was a national bank, had violated the United States Revised Statutes relative to the exaction of usury, had thereby forfeited the interest, and prayed for an accounting of the interest. Mr. Justice Hughes deals in part with the question, as follows:

> "The judgment thus rests upon an independent or non-Federal ground which was adequate to sustain it. The court applied a familiar equitable principle in defining the basis upon which extraordinary aid would be given. 'A court of equity is not positively bound to interfere in such cases by an active exertion of its powers; but it has a discretion on the subject, and may prescribe the terms of its interference.' Story, Eq. Jur. Sec. 301; Fanning v. Dunham, 5 Johns. Ch. 122, 142, 143, 9 Am. Dec. 233; Tiffany v. Boatman's Sav. Inst. 18 Wall. 375, 385, 21 L. ed. 868, 879. It is manifest that the plaintiffs were not proceeding by virtue of any Federal right in seeking to have the conveyances which had been executed in the form of absolute transfers of title declared to be mortgages; and it was competent for the court whose intervention was desired for this purpose, to demand that its conscience be satisfied by the doing of equity on the part of those who asked it.
>
> "The decision involves simply the exercise of the equitable jurisdiction in accordance with the jurisprudence of the state, and the ruling which pre-

scribed the conditions of relief is not reviewable here."

The final decision by the Court of Appeals in the case at bar was, merely, that under the general law a partnership had been dissolved by an act of the law—one manifestation of vis major—and that therefore no right of action existed upon an executory contract. The court attempted no construction of any Federal statute nor any clause of the Federal constitution.

Respectfully submitted,

ALEX. C. KING,
CHAS. T. HOPKINS,
Counsel for James R. Gray, Defendant in Error.

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Office Supreme Court
FILED
OCT 24
JAMES D. MAHER

Supreme Court of the United States

OCTOBER TERM, 1914

No. 110

SIMON LESSER,
Plaintiff in Error

vs.

JAMES R. GRAY,
Defendant in Error

MOTION TO DISMISS WRIT OF ERROR

ALEX. C. KING,
CHAS. T. HOPKINS,
Counsel for Defendant in Error

Johnson-Dallis Co., Printers, Atlanta, Ga.

MOTION TO DISMISS THE WRIT OF ERROR.

And now comes James R. Gray, defendant in error in the above entitled cause, by Charles T. Hopkins and Alex. C. King, his counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction upon the following grounds:

I.

This writ of error is a writ of error taken to the Court of Appeals of the State of Georgia to reverse a decision of that Court upon the ground that the plaintiff in the Court of Appeals, who is plaintiff in error in this writ, specially set up and claimed a title, right, privilege and exemption under the Statutes of the United States relating to bankruptcy, to-wit: The Act approved July 1, 1898, and the subsequent Acts amendatory thereof, and claimed that his debt having been disallowed and adjudicated by the bankruptcy court to be not provable in bankruptcy against the assets of the bankrupt, the proceedings in bankruptcy and the discharge of the defendants were no bar to the prosecution of his suit and that the plea of bankruptcy was not available to the defendants, which claim was expressly overruled and denied by the final judgment of the Court of Appeals of Georgia aforesaid, and which said judgment was a decision against the right, title, privilege and exemption especially set up and claimed as aforesaid

by the plaintiff in error under said Statutes of the United States.

The record in this case affirmatively shows that no decision has been made in the case against any title, right, privilege or immunity set up or claimed by either party thereto under the Constitution, Treaties, Statutes, Commission or Authorities of the United States.

The record shows upon its face that the same is a suit brought by the plaintiff claiming the right to recover anticipatory damages upon an executory contract and that the plaintiff insisted that his right to recover was the same as it had been prior to the institution of the proceedings in involuntary bankruptcy against the defendant recited by the plaintiff in his petition and that his rights of action under the common law and Statutes of Georgia were not affected by such bankruptcy proceedings. The defendant by his demurrer asserted the claim that, by reason of said involuntary proceedings in bankruptcy, the partnership of which he was a member, and against which said claim was alleged to exist, had been dissolved and the contract sued on had been terminated and all right to recover the damages sued for destroyed and the decision of the State Court was in favor of the claim and right thus set up in favor of the defendant.

This movant shows that this Court hath jurisdiction of the writ of error to the said Court of Appeals of Georgia only in case where its decision is against the title,

privilege, right or immunity set up or claimed under the said Constitution, Treaties, Statutes, Commission or authorities of the United States of America and that therefore this Honorable Supreme Court is without jurisdiction to entertain the writ of error in this case.

II.

Your movement further shows that it appears from the record in this case that the decision of the Court of Appeals was not based upon any construction of the Statutes of the United States relating to bankruptcy, nor did the same involve a federal question, which was decided adversely to the claim of the plaintiff in error therein.

III.

That the decision of the Court below sustained a general demurrer on the ground that the petition set forth no cause of action, nor any facts which give the plaintiff any legal rights against the defendant, together with other grounds of demurrer not involving any question under the Bankruptcy Act, or any other Statute of the United States, or any part of the Constitution of the United States, which demurrer was sustained generally and the case dismissed as to the movant, James R. Gray.

That the decision of the Court of Appeals, while discussing only one ground of the demurrer does not overrule or disallow the other grounds of demurrer, and the reversal of the Court of Appeals as to the ground

which said Court has discussed in this decision would, under the practice and procedure in Georgia leave the judgment of the trial Court affirmed on all other grounds of demurrer, so that the judgment of the Court of Appeals is sustainable upon grounds other than the alleged federal question.

For which said several reasons James R. Gray, by his counsel, moves that this writ of error be dismissed for want of jurisdiction.

ALEX. C. KING.
CHAS. T. HOPKINS,

Counsel for Defendant in Error, Appearing for the Purposes of this Motion.

FILED

OCT 26 1926

ALEX C. KING,

CHAS. C. HOPKINS,

Counsel for Defendant in Error.

Johnson-Hamlin Co., Printers, Atlanta, Ga.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914

No. 110

SIMON LESSER,
Plaintiff in Error
vs.
JAMES R. GRAY,
Defendant in Error

In Error to the Court of Appeals of the State of Georgia

To Mr. Henry A. Alexander,
Counsel for Plaintiff in Error:

Please take notice that on Monday, the 16th day of November, 1914, at the opening of said Supreme Court, or so soon thereafter as counsel can be heard, the motion to dismiss in the above stated case, a copy of which is herewith delivered to you, will be submitted to the Supreme Court of the United States for the decision of the Court.

Accompanying this notice is a copy of the brief of argument to be submitted with said motion in support thereof.

This October 23rd, 1914.

ALEX. C. KING,
CHAS. T. HOPKINS,
Counsel for Defendant in Error, appearing for the purposes of this motion.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914

No. 110

SIMON LESSER,
Plaintiff in Error
vs.
JAMES R. GRAY,
Defendant in Error

In Error to the Cou rt of Appeals of the State of Georgia

Due and legal service is acknowledged of a copy of the motion to dismiss in the above stated case.

Also of notice that said motion will be presented to the Honorable Supreme Court of the United States on the 16th day of November, 1914.

Also of the brief of the Defendant in Error upon the motion to dismiss.

This October 23rd, 1914.

HENRY A. ALEXANDER,
Counsel for Simon Lesser,
Plaintiff in Error.

SIMON LESSER,
Plaintiff in Error

v.

JAMES R. GRAY,
Defendant in Error

Supreme Court of the United States
October Term, 1914
No. 110

The cases cited by plaintiff in error do not reach the points made in the motion to dismiss.

Palmer vs. Hussey, 119 U. S., 96, rules simply that where plaintiff sues asserting that his debt is saved by an express section of the Bankrupt Act from the effect of the discharge in Bankruptcy and relies on such Act to save it and the decision is adverse to his contention that the decision is one adverse to a Federal right thus asserted.

Dimmock vs. Revere Copper Co., 117 U. S., 559, was a case where the bankrupt pleaded his discharge and the State Court denied the Federal Right thus asserted.

Long vs. Bullard, 117 U. S., 617, the writ of error is retained solely on the ground that appellant asserted that his discharge in bankruptcy relieved him and that the decision was adverse to the right set up.

McCormick vs. National Bank, 165 U. S., 538, overrules Strader vs. Baldwin, 9 How. 261 (which we did not cite); it did not mention or overrule Linton vs. Stanton, 12 How. 423 (cited by us) or Calcote vs. Stanton, 18 How. 243.

It points out that in Strader vs. Baldwin, 9 How. 261, the Court overlooked the fact that both parties set

up claims under the Bankrupt Act. That the plaintiff set up that he had the right to avoid the discharge under the rights given to him by the section saving fiduciary debts. The Court denied such right. The case in 165 U. S. 538 is the same thing.

The other cases cited, each and all, recognize that the appellant must be setting up a **Federal Right and that the decision** below must have denied the **Federal right**, not merely have decided against him.

The case of Linton vs. Stanton, 12 Howard 423, was one in which a defendant pleaded a discharge in bankruptcy. The plaintiff did not set up any right given him by the Bankrupt Act, but resisted the discharge as irregular. The Court sustained the plea of discharge. The plaintiff sued out a Writ of Error, and the case was dismissed by the Court because the case was not one of a decision adverse to a Federal Right set up by the Plaintiff in Error.

In the present case the defendant being sued on a partnership contract pleads that being discharged in Bankruptcy as shown by plaintiff's petition, the legal effect of the bankruptcy is to dissolve, by operation of law, the partnership of which defendant is a member, and that as a matter of general law, where a partnership is dissolved, for any cause, it terminates all executory contracts and ends liability for anticipatory breaches.

The plaintiff's contention **was not** that the Bankrupt Act excepted this contract from the effect which the discharge would otherwise have had, nor was the defendant's contention that the discharge relieved him from the lia-

bility existing thereon; but plaintiff contended that the liability claimed to have arisen by breaches of this executory contract after discharge was not affected thereby and defendant contended that as involuntary bankruptcy dissolved a partnership, **se invito**, the **Common Law** terminated the contract as a result of this event, and therefore, that there could not be anticipatory breaches or damages.

ALEX C. KING,
CHAS. T. HOPKINS,
Counsel for James R. Gray,
Defendant in Error.

Office Supreme Court
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JAMES D. MAHER
CLERK

SIMON LESSER,
Plaintiff in Error

v.

JAMES R. GRAY,
Defendant in Error

Supreme Court of the United States
October, Term, 1914
No. 110

BRIEF FOR PLAINTIFF IN ERROR UPON MOTION TO DISMISS THE WRIT OF ERROR.

The contentions made in the 1st and 2nd grounds have been considered and overruled by Palmer v. Hussey, 119 U. S. 96; Dimmock v. Revere Copper Co., 117 U. S. 559; and Long v. Bullard, 117 U. S. 617.

Three older cases appearing to support the contention of the movant: Strader v. Baldwin, 9 How. 261; Linton v. Stanton, 12 How. 423; Calcote v. Stanton, 18 How. 243, have been overruled by McCormick v. Market National Bank, 165 U. S. 538. See also: Winchester v. Heiskell, 119 U. S. 450; Rector v. City Bank etc. Co., 200 U. S. 405; Miller v. N. O. etc. Co., 211 U. S. 496; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300; Zavelo v. Reeves, 227 U. S. 625, 628.

The opinion of the Court of Appeals stated plainly that it was controlled by one question and stated plainly what that question was (14). Involving as that question did, the interpretation of a Federal statute, the Bankruptcy Act of 1908 and its amendments, it was manifestly a Federal question. The opinion also stated plainly that the

plaintiff in error contended for an interpretation of this Federal statute contrary to that enforced by the court (17). Obviously, by the overruling of his contention, a right, privilege and immunity claimed under Federal law was denied.

The recital of the proceedings in bankruptcy was necessary to a clear statement of the plaintiff's cause of action, particularly as to breach. But even if not so, the defendant's demurrer itself expressly raised a number of distinct Federal questions (11), all of which were decided by the Court of Appeals against the contentions of the plaintiff.

The non-Federal question raised by the second ground of the demurrer is destitute of merit, has never throughout the whole case been even referred to by court or counsel, and is not now claimed to be meritorious, or to have controlled, or to be broad enough to sustain the judgment of the Court of Appeals.

The third ground of the motion assumes that if this court upholds the contentions of the plaintiff in error, it will reverse on these special grounds only. This is an error, for if this court is convinced that the decision of the lower court was controlled by its interpretation of Federal law, and that there was no non-Federal ground broad enough to sustain the judgment, it will reverse generally. Judicial Code of the United States, §237.

Respectfully submitted,

HENRY A. ALEXANDER,

For Plaintiff in Error.

Office Supreme Court,
FILED
OCT 19 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1914

No. 110

SIMON LESSER,
Plaintiff in Error

v.

JAMES R. GRAY,
Defendant in Error

WRIT OF ERROR

to the

COURT OF APPEALS OF GEORGIA

Brief and Argument for Plaintiff in Error

HENRY A. ALEXANDER,
Of Counsel.

HENRY A. ALEXANDER,
C. HENRY COHEN,
RODNEY S. COHEN,
Attorneys for Plaintiff in Error.

Johnson-Dallis Co., Printers, Atlanta, Ga.

SUBJECT INDEX.

INDEX OF CASES.

STATEMENT OF THE CASE.

(Figures in parenthesis refer to pages of the printed transcript of the record.)

On July 23, 1907, Simon Lesser of Augusta, Ga., entered into a written contract with Inman & Company, a partnership, to supply them with not less than 500 nor more than 700 bales of "patches," a material for bagging cotton, during the season beginning September 1, 1907, and ending September 1, 1908. On May 4, 1908, after 176 bales had been delivered and paid for, an involuntary petition in bankruptcy was filed against Inman & Company in the District Court of the Northern District of Georgia. On May 25th and July 1st, following, the partnership and its members, including James R. Gray, were adjudicated bankrupts. Thereafter no demand was made upon Lesser for further deliveries, and no tender made by him. In July and September, 1908, discharges in bankruptcy were granted the partnership and each of its members from all their provable debts which existed on May 4, 1908, the date of the filing of the petition. In February, 1909, the price of patches having declined, Lesser filed proof of his claim in bankruptcy, claiming damages measured by the difference between the contract price of the undelivered 326 bales and their highest market price between the adjudication in bankruptcy and September 1, 1908. The trusteee objected to the claim upon the ground that it was not provable in bankruptcy in that no breach had occurred at the date of the filing of the petition; that the claim was not due and owing at the date of the adjudication; that it was not a fixed liability absolutely owing at the time of the filing of the petition, or at the date of

the bankruptcy or adjudication, and that it was not an existing demand at such time. (7, 8). They further alleged that Lesser's contract had not been avoided by the adjudication. (7).

A statement of the facts was agreed upon for the trial before the referee. (8, 9). After a hearing, he entered an order disallowing the claim and holding it not provable. (4). The question having been certified to Judge Newman, he, on January 1, 1910, rendered a decision holding that where involuntary proceedings in bankruptcy were instituted, it did not constitute such a breach of an executory contract as to authorize proof in bankruptcy for the amount of damage claimed to have been caused by the failure to carry out the contract, and entered a judgment approving the order of the referee. (10). In re Inman & Co., 175 Fed. 312. There was no appeal from this judgment.

On March 16, 1910, Lesser, taking the position that inasmuch as his claim was not provable in bankruptcy, it was not dischargeable, and that the discharge in bankruptcy was, therefore, not available against him, filed suit against Inman & Company in the City Court of Atlanta upon the claim, asking judgment in the principal sum of $1,519.57, the difference between the contract price and the highest market value of the merchandise that had not been taken by Inman & Company. (2). James R. Gray, the only defendant of whom jurisdiction was obtained, filed a general demurrer (11) which, on June 8, 1910, was sustained. A judgment was entered dismissing the suit. (12).

On January 24, 1911, a judgment was entered by the Court of Appeals, to which a writ of error had been taken, affirming the judgment of the City Court (Lesser v. Gray, 8 Ga. App. 605), and on January 11, 1913, a writ of error was issued to the Court of Appeals bringing the case to this court. (18).

SPECIFICATION OF ERROR.

The error asserted and intended to be relied upon is the judgment of the Court of Appeals of January 24, 1911, affirming the judgment of the City Court of Atlanta of June 8, 1910, sustaining the demurrer and dismissing the case as to the defendant, James R. Gray.

BRIEF AND ARGUMENT.

The seven grounds of the demurrer will be taken up and discussed seriatim.

1. **"Said petition sets forth no cause of action against this defendant, nor does it set forth any facts which give the plaintiff any legal rights of any kind or character against this defendant."**

The first general ground is covered by the discussion of the other grounds.

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2. **"Because there is a non-joinder of parties-defendant, said petition disclosing that James F. McGowan was a member of said firm, and because his personal representative has not been made a party to said suit."**

This ground of the demurrer raises a non-Federal question. It was, however, not even referred to in the brief or argument of counsel nor in the decision of the lower court, and was not considered seriously by either, the judgment of the lower court having been placed expressly upon its interpretation of Federal law. In order, however, that this court may see for itself that the point could not, in any view, have controlled the decision of the lower court, its total lack of merit will be here shown. The contention is in sharp conflict with the settled law of the State. In the case of Roosvelt v. McDowell, 1 Ga. 499, decided in 1846, the Supreme Court held

that it was the rule at common law that the executor of a deceased partner could not be sued at law for a copartnership debt, but that the surviving copartner was alone liable to be sued therefor. Ross v. Everett, 12 Ga. 30; Sheffield v. Kay, 14 Ga. 537, 30 Cyc. 643. The Court further ruled that the Act of 1818 (embodied in §5596 of the present Code of Georgia of 1910) permitting the joinder of the representatives of a deceased partner, being in derogation of common law, must receive a strict construction and was not intended to embrace the contract of partners where the partnership name alone was signed to the instrument. In that case, a contract was signed with the copartnership name of "Walker & Leak." The doctrine of this case has never been qualified in any way. In 1858, an act was passed, now embodied in §5597 of the Code of 1910, expressly extending the terms of the act of 1818 to copartners, but not changing in any respect the ruling of the Supreme Court that the act of 1818 did not apply where the obligation was signed in the copartnership name, and not with the names of the individual members.

Furthermore, a conclusive reply to this contention of the defendant in error is the fact that the act of 1818 was, by its express terms, permissive and not mandatory, and did not alter the rule of common law, but merely extended a privilege to the plaintiff which he was at liberty to avail himself of or not as he might see fit. §§5596-97 of the Code, referred to, are as follows:

"§5596. **Representative of obligor may be sued, etc.** Where any person shall be in possession (in his own right, or in any other capacity) of any note, bill, bond, or other obligation in writing, signed by two or more persons, and one or more of the persons whose names are so signed as aforesaid shall die before the payment of the money, or the compliance with the conditions of said bond or obligation in writing, the person holding such bill, bond,

note, or other obligation in writing shall not be compelled to sue the survivors alone, but may at his discretion sue the survivor or survivors, or the representatives of such deceased person or persons, or survivor or survivors, in the same action with the representative or representatives of such deceased person or persons; provided, nothing herein contained shall authorize the bringing of an action of any kind whatever against the representative or representatives of any estate or estates, until twelve months after the probate of the will, or the granting of letters of administration on such estate or estates."

§5597. **Includes copartners.** The preceding section shall be so construed as to embrace debts against copartners, as well as against joint and several contractors."

Besides, it is the unquestioned law of Georgia, as elsewhere, that the liability of partners is several as well as joint.

Weatherly v. Hardman, 68 Ga. 592.
Reid v. Wilson, 109 Ga. 424.

Code 1910, §3156, which reads as follows:

"**Extent of partnership.** As among partners, the extent of the partnership is determined by the contract and their several interests. As to third persons, all are liable, not only to the extent of their interest in the partnership property, but also to the whole extent of their separate property."

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3. **"Because said petition discloses upon its face that in July and September, 1908, a formal judgment of discharge was duly entered in the bankruptcy proceedings by the District Court for the Northern District of Georgia, and that said discharge acquits this defendant of any right or claim in favor of the plaintiff, and particularly of the claim asserted in the foregoing suit."**

The third ground was without merit. The petition showed that the plaintiff's claim had been adjudged by the bankruptcy court, to which it had been presented for proof, to be not provable, and a discharge in bankruptcy operates to relieve the bankrupt from his provable debts only.

Bankruptcy Act, Sec. 1, Sub-Sec. 12, and Sec. 17.
Riggin v. Magwire, 15 Wall. (82 U. S.) 549.
Crawford v. Burke, 195 U. S. 176, at 186.
Tindle v. Birkett, 205 U. S. 183.
Grant Shoe Co. v. Laird, 212 U. S. 445, at 448.
Zavelo v. Reeves, 227 U. S. 625, at 632.
Mooch v. Market Street Bank, 107 Fed. 897. (C. C. A. 3d Circuit.)
Hamilton v. McCroskey, 112 Ga. 651.
Graham v. Richerson, 115 Ga. 1002.
Williams & Co. v. U. S. Fidelity, etc. Co., 11 Ga. App. 635.
Haber-Blum-Bloch Hat Co. v. Friesleben, 5 Ga. App. 123.
Baker v. Hooks, 6 Ga. App. 121.
National Surety Co. v. Medlock, 2 Ga. App. 665.
Wright v. Gottschalk, (Tenn. Ch. App.) 43 L. R. A. 193, 48 S. W. 140.
Dight, Receiver v. Chapman, 44 Oregon 272, 65 L. R. A. 793, 75 Pac. 585.
Sayre v. Glenn, 87 Ala. 631, 6 So. 45.
Glenn, Trustee v. Howard, 65 Md. 61, 3 Atl. 895.
Deane v. Caldwell, 127 Mass. 242, 244.
Paddleford v. State, 57 Miss. 118, 121.
Haywood v. Shreve, 44 N. J. L. 94.
Manion v. Campbell, 10 Mo. App. 92.
Eberhardt v. Wood, 2 Tenn. Ch. 488.
Collier on Bankruptcy, 9th Ed., page 384.
Remington on Bankruptcy, §628.

It is submitted that the truth of this proposition is inherent in the very nature and purpose of the bankruptcy law, which is the distribution of the insolvent's estate among his creditors on equal terms, and after and because of such distribution, his release from further liability to them, the design being evidently to give him an opportunity to rebuild his fortunes free from the burden and harassment of his old debts. As to claims of creditors, it is evidently the theory of the law that if these claims are allowed participation in the estate, and receive their equal proportionate share, the creditor should be satisfied, the bankrupt having done all in his power for the honest payment of his debts. But it is equally evident that this participation by the creditor in the bankrupt's estate is an essential prerequisite to the discharge of his debt, for it would be repugnant to every instinct of justice that a creditor should be denied the right to participate in the distribution of the estate, and be also denied the right to sue elsewhere. It would be doubly strange if the very fact of the denial to him of participation in the bankruptcy court should be the basis of an objection to a suit in the general court. And yet this is exactly the contention of the defendant in error. His position is simply this: "Because I have succeeded in preventing you from sharing with my other creditors in my insolvent estate, you should not be allowed to sue me in the state court."

The manifest purpose of the bankruptcy act contradicts such a contention. Under the classification of the act, claims are either provable or not provable. If they are provable, then, with certain express exceptions, not affecting this case, they are dischargeable. If they are not provable, they are not dischargeable. This is the inevitable conclusion from the plain language of the act, and the purpose which it seeks to accomplish. The language of section 17 is:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except, etc."

The unavoidable implication of this is that if debts are not provable they are not dischargeable. So manifest is this, that doubtless it never occurred to the draftsman of the act that there was any necessity of saying so expressly.

It may be seriously questioned whether Congress has the constitutional power to enact a bankruptcy law which would grant discharges against debts which, because they had not matured at the date of the filing of the petition, were held to be not provable and denied participation in assets. The power of Congress over the subject of bankruptcies is derived exclusively from paragraph four of section eight of article one of the Constitution. The common understanding of the purpose of a bankruptcy law at the time of the adoption of the Constitution was the distribution of the assets of an insolvent among his creditors. This was the primary purpose. Discharge of the bankrupt was granted only by consent of four-fifths of the creditors. 2 Bl. Com. 483; Nelson v. Garland, 1 How. 265; Hanover National Bank v. Moyses, 186 U. S. 181. Discharge as a matter of right was a later development. It would be an inversion of the original understanding of the term "bankruptcies" to enact a law which would deny a creditor participation in the division of the assets and, at the same time, grant the bankrupt a discharge from the debt. Such an arrangement would be confiscation pure and simple, and so far from being authorized by the paragraph of the Constitution empowering Congress to establish uniform laws on the subject of bankruptcies, would run counter to the fifth amendment to the Constitution forbidding Congress to deprive any person of life, liberty or property without due process of law.

4. **"Because said petition shows that an adjudication in bankruptcy was had upon an involuntary petition filed against the firm of Inman & Company, and its members, which said petition was filed on May 4, 1908, the adjudication thereon being on May 25, 1908; and that after said adjudication, said firm and its executory contracts or purchase were dissolved and annulled by operation of law—said petition showing that the petition in bankruptcy was an involuntary proceeding, and said petition further disclosing that at the time of the filing of said petition for an adjudication in bankruptcy no breach of said alleged contract had occurred upon the part of said Inman & Company."**

This fourth ground of the demurrer is sustained by several decisions in the lower Federal courts holding that the adjudication in bankruptcy operates to cancel and destroy all executory contracts of the bankrupt. Among the cases to that effect are:

In re Jefferson, 93 Fed. 948.
Bray v. Cobb, 100 Fed. 270.
In re Hays, Foster & Ward Co., 117 Fed. 879.
Bailey v. Loeb, 2 Fed. Cas. 376.
Malcomson v. Wappoo Mills, 88 Fed. 680.

A study of these cases reveals no other basis for this ruling than the mere assertion of the court that the adjudication is an act of the law. Why an act of the law should have this effect is not stated. The reasoning ends abruptly with that assertion. There is no reference to any general principle from which the proposition may have been deduced. It is submitted that the ruling is purely arbitrary, and has no basis in reason or authority. It is irreconcilable with the well established rule that trustees in bankruptcy or receivers in equity have the option, if they deem it to the advantage of their estate, to adopt and carry out the executory contracts. United States Trust Co. v. Wabash Western Ry., 150 U. S. 287,

300; First National Bank v. Lassiter, 196 U. S. 115. This option is incompatible with the idea that adjudication in bankruptcy terminates and destroys the executory contracts of the bankrupt. The right of the trustee or receiver to adopt an executory contract implies inevitably that it is still in full force and effect. But if the adjudication has destroyed it, how can the trustee adopt it? If adjudication ends executory contracts, the rule must be mutual and must have this effect in all cases, not only when the execution of the contract is to the disadvantage, but also when to the advantage, of the estate. It certainly can not be contended that this destructive effect follows only when the contract is to the disadvantage of the estate. A rule should work both ways. To hold that the contract was dissolved when the estate would lose by it, but unaffected when the estate could gain, would be wholly arbitrary and contrary to the plainest principles of mutuality and equality.

Take the facts of the present case. Suppose the price of the merchandise sold by Lesser had gone up instead of down, and there had been a profit in the contract to the estate of fifteen hundred dollars. Is there any doubt that the trustees would have demanded of Lesser the fulfillment of the contract? And if he had refused, is there any doubt that the court would have compelled it? Suppose, under the circumstances, Lesser had attempted to plead that the contract was executory, that it had been vacated and annulled by the adjudication in bankruptcy and that he was therefore released from liability. Would the plea have been taken seriously? Take the case of an executory rental contract. Suppose a retail merchant had succeeded in securing a long lease on a desirable location at a rental, say, of $50,000, below the real value of the premises. Suppose he is adjudged bankrupt, with a term of ten years yet to run under the lease. If the trustee in bankruptcy should undertake to take posses-

sion of and sell, as part of the estate, the remainder of the lease, would the landlord be heard to object on the ground that the lease was an executory contract; that the adjudication in bankruptcy avoided all the bankrupt's executory contracts; and that, therefore, the lease was annulled and cancelled? Take the case of an executory contract of employment. Suppose a land company had succeeded in obtaining an advantageous contract with a construction company by which the latter was to erect for the former at a price of $100,000 a building whose real worth would be $150,000. The land company goes into bankruptcy and the trustee demands of the construction company that it fulfill its contract and proceed at once with the work. Would it be heard to object on the ground that its contract was executory; that the adjudication in bankruptcy had dissolved all executory contracts; and that, therefore, its obligations under the building contract were cancelled and annulled? Take another case of an executory contract of employment. Suppose an electrical manufacturing corporation had an advantageous contract with an electrical engineer, from which, on account of better offers from other sources, he desired to be released. If the manufacturing corporation was adjudged bankrupt and the receiver or trustee decided to carry on the business and retain the engineer, would he be heard to object on the ground that his contract was executory; that adjudication in bankruptcy terminates all executory contracts; and that, therefore, his obligations under the contract were terminated and dissolved? No court would hesitate for an instant to answer these questions in the negative. How, then, can it be contended that executory contracts are dissolved by adjudication?

There is no better reason for declaring that adjudication in bankruptcy dissolves the obligation of executory contracts than that any other legal proceeding does so.

If adjudication destroys these obligations, why does not the filing of an ordinary suit and the issuance of the process or other writ have the same effect? When A sues B to recover damages for the breach of an executory contract, why does not the filing of the suit dissolve the obligation of the contract and destroy the claim? It is as much an act of the law as adjudication. If, as declared by the Court of Appeals, an act of the law dissolves executory contracts, that result should certainly follow. It would be no stranger than that worked out in the present case. Bankruptcy is simply a proceeding to distribute equally among his creditors the assets of an insolvent. There is nothing in the nature of the proceeding that should make it the means of destroying the rights of those whose contracts with the insolvent were executory. Its effect should be exactly the contrary, for the underlying intent of bankruptcy is preservation, not destruction. No reason whatever appears why it should operate to confiscate and destroy the claim of one creditor for the benefit of the others, merely because executory.

The qualification of the doctrine that adjudication in bankruptcy dissolves executory contracts to the effect that this result does not follow when the petition is voluntary does not render it any more reasonable. The distinction between voluntary and involuntary petitions is adventitious, and purely a matter of form, for many petitions involuntary in form are procured to be filed by the bankrupt, and, apart from form, no petition is really voluntary, and all are involuntary, for all are forced by circumstances upon the bankrupt against his will.

Besides, when was it ever suggested that the power of the trustee to adopt an executory contract of the bankrupt depended upon the form of the petition, and that if it were voluntary, he could, and, if it were involuntary, he could not adopt it?

Another indication that the Court of Appeals was in

error in concluding that executory contracts are avoided by adjudication is the fact that the bankruptcy act itself contains no language whatever supporting such a conclusion, either expressly or by implication. It is hardly conceivable that if the framers of the act had intended so momentous and far-reaching a result, they would not have said so in so many words. So important a consequence would not have been left to implication or judicial interpretation. As far as its language goes, the only part of the bankruptcy act which contemplates the relief of the bankrupt from his debts is the judgment of discharge. It seems strange that the adjudication should have been intended to have a like result and there be not the slightest word or suggestion to that effect. Looking to the language of the act. it would seem that there was only one means provided for relieving the bankrupt from his debts—that is, the judgment of discharge. It would appear, however, if the Court of Appeals and the courts taking the same view be correct, that all the while there have been two, and that the remedies of creditors could be destroyed not only by the discharge, but by adjudication as well, but with this important difference to the creditor: if his claim be destroyed by a discharge he is entitled to participate in the distribution of assets; but if by adjudication, it is completely extirpated and wiped out and no participation is allowed. Indeed, under this ruling, a bankrupt who, on account of his violation of the act, had been denied a discharge, might still be relieved of a large part of his debts through the destruction of his executory contracts by his adjudication. It is submitted that if the framers of the bankruptcy act had intended so vital a consequence they would have said so, and that there is no warrant whatever for the courts to import this meaning into its plain terms.

The gist of the Court of Appeals' decision was that the bankrupt partnership, Inman & Company, was dis-

solved by the adjudication in bankruptcy and that it followed, as an "inevitable corollary" that its executory contracts were "ended." The first proposition as to the dissolution of the firm is undoubtedly correct, but it is respectfully submitted that the second, that the dissolution of a partership ends its executory contracts, is in conflict with fundamental principles.

Another view of the matter to be considered is this: Both the language and the reasoning of the Court of Appeals in declaring that adjudication avoids executory contracts are broad enough to include, not only contracts, which, like that involved in the present case, are executory as to both the creditor and the bankrupt, but also those which are executory as to the bankrupt only. For, in the terminology of the law of contracts, the word "executory" is not confined to those unperformed by both parties. It applies as well to those unperformed by one party only. It simply designates that status of contractual obligation in which the act undertaken is yet to be performed. As to the reasoning on which this doctrine is rested, there is as much basis for saying that an act of the law avoids contracts executory as to one party, as for saying that it avoids contracts executory as to both.

Under this interpretation, it is evident that the doctrine that adjudication avoids executory contracts would include in its scope practically every class of debt that might be proved against a bankrupt's estate. For the class of debts enumerated by Section 63 of the bankrupt act as provable are all of them, with the possible unimportant exception of court costs, contracts which are executory as to the bankrupt. The practical result would be, therefore, that adjudication would instantly restore the bankrupt to solvency, obviate the necessity, or, indeed, the utility, of further proceedings, and send him

forth from court clothed with all his assets and wholly absolved from all his debts.

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5. **"Because said petition shows that said contract was not performed, and no offer or tender of performance was ever made by the plaintiff to said bankrupt firm, or to the receivers or trustees thereafter duly appointed for said firm."**

This fifth ground of the demurrer is without merit. Under the circumstances, no tender was necessary.

In re Swift, 112 Fed. 315.

Hills v. National Albany Exchange Bank, 105 U. S. 319.

U. S. v. Behan 110 U. S. 338.

Lovell v. St. Louis, etc. Ins. Co., 111 U. S. 264.

The case of In re Swift, supra, was practically identical in its facts with the instant case, and presented the question of the provability of a claim for damages for the breach of an executory contract for the sale of stocks. Discussing the question of tender, the court said:

> "We have, therefore, to deal with an agreement by which the bankrupts bound themselves to deliver certain stocks to Dee on payment of the balance from him to them, and by which also the bankrupts were entitled, on reasonable notice, to tender the stocks to their customers and claim like payment. But neither party fulfilled the ordinary conditions applicable to such relations. Neither made a demand or tender. Consequently, according to the ordinary rules of law, no cause of action arose in favor of either party against the other.
>
> The position is one, therefore, to be solved by the law itself. The case has no relation to any

question of the rights of either party, or the representative of either, including the trustee in bankruptcy, to make a demand and tender at any time, either prior or subsequent to a voluntary assignment or the beginning of proceedings in bankruptcy. * * * * * *

As we have already said, the solution of the proper relations of the parties in this case growing out of the assignment, or out of the filing of the petition in bankrupcty, is fixed by the law; and the simple rule, based on fundamental principles, and traceable in the text writers and decisions of the courts for fully a century, must be applied to the effect that, "**where a man has disabled himself from performing his contract, it is unnecessary to make any request or demand for performance.**" Chit. Cont. (11th Am. Ed.) 1073. This rule was stated and applied in the reports as early as 1819, in Newcomb vs. Brackett, 16 Mass. 161, 166, where it was said that the defendant had conveyed to a stranger land which he had promised to convey to plaintiff, and that thus he had excused the plaintiff from making a tender, and entitled him to damages for breach of contract. It was also laid down in the broad language of Chitty on Contracts, in Lovell vs. Insurance Co., 111 U. S. 264, 274, 4 Sup. Ct. 390, 28 L. Ed. 423. Indeed, it is such an ancient rule, and so universally recognized, as to need no citation of authorities to justify its application in this case, where, as we have said, neither party has done any act ordinarily necessary to entitle him to enforce the contract, or recover damages for its breach, but each has left the mutual relations to be worked out by the law.

These propositions may be made somewhat clearer by comparing the position of a banker with that of stockbroker. A banker has not, ordinarily, on hand

sufficient funds to meet the check of all his depositors if they should all draw simultaneously, and he is not expected to do so. A like rule applies to stockbrokers. In the one case as well as in the other, so long as either remains solvent, he is presumed to be able to meet his contracts; and no action can be maintained against a banker by a depositor without first drawing a check or making some other proper demand, nor, in the case of a stockbroker, without a tender by his customer of the balance due him, and a demand of his stock. On the other hand, when either has made a voluntary assignment for the benefit of creditors, or gone into bankruptcy, or, perhaps, when he has committed other notorious act or insolvency, he has parted with the control of his assets, and the law assumes, as is the fact, that **his ability to perform his contracts has terminated, and that a demand and tender would be futile, and, ordinarily, an action may at once be brought.**''

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6. **''Because said petition shows that the plaintiff's cause of action was presented by him to the bankrupt court in said bankruptcy proceedings, and denied by said court in a final judgment, on January 1, 1910; and because said petition does not allege that said final judgment was ever reviewed, reversed or set aside—the matters and things connected with said claim being res adjudicata.''**

In this sixth ground of the demurrer, the statement that the plaintiff's cause of action was ''denied'' by the court in a final judgment misstates the facts. The merest reading of the decision of the court shows that it was not a ''denial'' of the claim. It was a judgment that there having been no breach of the contract at the date of the filing of the petition, it was, therefore, not provable. A decision on this ground that a claim is not provable is not the equivalent of a judgment ''denying'' the

claim. It means only that, the claim being immature, the bankruptcy court has no jurisdiction to deal with it, either to declare it valid or invalid. Such decision is analogous to the judgment of a court of general jurisdiction sustaining a plea in abatement based on the ground of the prematurity of the suit. The effect of such a judgment is to adjudicate, not the validity or invalidity of the cause of action, but to declare only that that particular court had then no power to pass upon it. This is a statement of an elementary and unquestioned principle of pleading. In 23 Cyc. 1151, it is said: "A judgment on a plea in abatement is not a final judgment on the merits in such sense that it will bar another action for the same cause," and on page 1231 of the same volume it is again stated: "A judgment rendered upon a plea in abatement is conclusive as to the matter of the plea—the jurisdiction of the court, the capacity of the parties, and the like; but not as to the merits of the action." Again, on page 1147 of the same volume, it is said: "The dismissal of a suit on the ground that it was prematurely brought, the cause of action not having yet accrued, is no bar to another action on the same demand after time has removed the objection." The same principle is embodied in §5679 of the Code of Georgia, as follows: "**Former judgment, when not a bar.** A former recovery on grounds purely technical, and where the merits were not and could not have been in question, will not be a bar to a subsequent action brought so as to avoid the objection fatal to the first. For the former judgment to be a bar, the merits of the case must have been adjudicated."

The trustee in bankruptcy objected to the proof of Lesser's claim when it was presented in bankruptcy upon the following ground, which is the equivalent of a plea in abatement on the ground of the prematurity of the suit, to-wit:

"That said proof of claim sets up an anticipatory breach of a continuing contract to buy future installments of goods, and as such is not a provable claim in bankruptcy. Said proof shows that at the date of adjudication, as well as the filing of the petition, no breach of said contract had occurred. It is not shown by said proof that at the date of adjudication or the filing of the petition that the vendee had refused to perform said contract, or that it had given notice of its declination not to carry out the said contract. And your trustees show that the contract set forth is not such a contract as is avoided by an adjudication in bankruptcy, and, therefore, that the same is not a provable debt."

These objections were afterwards enlarged by the addition of the following amendment which emphasized and stated more definitely the plea of prematurity:

"That the amount claimed to be due in said proof of claim was not due and owing at the date of the bankruptcy, or at the date of the adjudication in said cause; that said claim was not a fixed liability absolutely owing at the time of the filing of the petition, or at the date of bankruptcy or adjudication; and that it was not an existing demand at such time."

So far from the trustees objecting to the claim on the ground that the contract had been avoided by the adjudication in bankruptcy, they explicitly contended that the exact contrary was true. The precise language of the objections on this point was:

"And your trustees show that the contract set forth is not such a contract as is avoided by an adjudication in bankruptcy and, therefore, that the same is not a provable debt." (7).

This question, therefore, whether the contract had or had not been avoided by the adjudication was manifestly not before the bankruptcy court. It had been wholly removed from the field of controversy by the explicit

statement of the trustees that the contract had not been avoided. Judge Newman had no such contention or issue before him and, therefore, even had he wished to, could not have effectually decided it. Reynolds v. Stockton, 140 U. S. 254, holding on page 270 that "in order to give a judgment, rendered even by a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings." There is nothing in the language used by Judge Newman which indicates that he attempted to decide such a contention.

Passing upon the issue actually before him, Judge Newman sustained the trustees' objections, the gist of his decision being: (10).

> "He (Lesser) relies upon an anticipatory breach of the contract caused by the bankruptcy proceedings. I do not believe that where involuntary proceedings in bankruptcy are instituted, and the bankrupt's business and effects are taken charge of by the court, and administered for the benefit of creditors, that it constitutes such a breach of an executory contract as to authorize proof in bankruptcy for the amount of damage claimed to have been caused by the failure to carry out the contract, nor do I think that any of the cases cited go to this extent."

It is submitted that this is not a "denial" of the plaintiff's claim. It was a holding merely that it was not ripe for proof in the bankruptcy court, and that that court had no jurisdiction of it. The court did not undertake to pass upon the validity or invalidity of the claim. Indeed, having first decided that it had no jurisdiction of the claim by holding it not ripe for proof, it had no judicial power to go further and deal with the question of validity. Whatever might have been said on the question of validity would have been obiter dicta, and beyond the judicial authority of the court.

It was contended by the defendant in error in the court below that the mere citation by Judge Newman of the case of Inman & Co., 171 Fed. 185, was intended by him as an adjudication that Lesser's claim had been invalidated and destroyed by the proceedings in bankruptcy, and, therefore, that no appeal having been taken and the judgment standing unreversed, it was binding, whether erroneous or not, on the plaintiff in error, and was res adjudicata. If the premise of the defendant in error be correct, his conclusion is undoubtedly correct, but with this premise, to-wit: that Judge Newman intended by the mere citation of the case referred to, to adjudicate that Lesser's claim had been invalidated by the adjudication in bankruptcy, we take sharp issue, and assert that such a deduction from his opinion is totally unwarranted and in the teeth of his express language, which we reprint here:

> "He (Lesser) relies upon an anticipatory breach of the contract caused by the bankruptcy proceeding. I do not believe that where involuntary proceedings in bankruptcy are instituted, and the bankrupt's business and effects are taken charge of by the court, and administered for the benefit of creditors, that it constitutes such a breach of an executory contract as to authorize proof in bankruptcy for the amount of damage claimed to have been caused by the failure to carry out the contract, nor do I think that any of the cases cited, go to this extent."

In the first place, Judge Newman's intention in citing the case of Inman & Company, supra, is ambiguous because that case dealt with two questions: whether there had been a breach of the claimant's contract prior to the filing of the petition so as to render it provable, and, second, whether the adjudication in bankruptcy had avoided the contract. The first question was the only one certified by the referee, and, being, therefore, the only question before the court, the judgment can only

be construed as a response to the question certified. General Order in Bankruptcy, Number 27, Reynolds v. Stockton, 140 U. S. 254. The actual language of the referee's certificate showing the issue intended to be presented by him (171 Fed. 185), was as follows:

> "To the claim as amended the trustee filed a motion to expunge on the ground that the said claim is not a provable claim in bankruptcy; that the amount claimed to be due was not due and owing at the date of bankruptcy; that said claim was not a fixed liability absolutely owing at the time of the filing of the petition in bankruptcy in this cause; that it was an existing demand at such time, but both the existence and the amount of the possible future demands are contingent upon unforseen events; and that it is neither an unliquidated nor liquidated provable claim, nor was it an unliquidated or liquidated provable claim on the date of the bankruptcy."

The court, on page 186, states the question before it as follows:

> "It is conceded that if a breach of contract had occurred prior to the commencement of the bankruptcy proceedings, and the claim for damages on account of the breach already existed, that the amount of such damages might be liquidated in such manner as the court might direct; but the immediate question is whether, where there is a discontinuance of employment growing out of, and resulting from, the filing of a petition in bankruptcy, and that only, the right to damage exists and may be proved and the amount of such damage ascertained."

It is thus apparent that the citation of the Inman case is, to say the least, ambiguous, for it may have referred to the ruling on the first proposition as well as on the second. There is no reason to assert that it was intended as a restatement of one of them any more than of the other.

But, assuming that Judge Newman did intend by the citation referred to to adjudge that Lesser's contract had been avoided and cancelled by the adjudication in bankruptcy, it is clear that he had no power to do so. When a claim is presented to a bankruptcy court for allowance, the first question to be determined by the court is whether it has jurisdiction, or, in other words, whether the claim is provable. If that question be answered in the affirmative, then the court may proceed to pass upon the validity or invalidity of the claim. But, if the court concludes that the claim is not provable, it can go no further, because, by this judgment, it has decreed its own lack of power to proceed further. If it should attempt nevertheless to adjudicate the merits of the claim, the act would be beyond its judicial authority and its words would be merely obiter dicta and without judicial force. This limitation upon the power of the court is inherent in the very nature of judicial action and applies equally to all courts, including those of bankruptcy jurisdiction. Bryan v. Bernheimer, 181 U. S. 188, at 197. In that case, it was said: "In the opinion of Bardes v. First National Bank, 178 U. S. 524, it was indeed said: 'The powers conferred on the courts of bankruptcy by clause 3 of §2, and by §69, after the filing of a petition in bankruptcy' and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the favorable seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him.' But the remark, 'can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant,' was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his

appointment." The decision in the Bardes case had been against the jurisdiction claimed. No court, however great its authority may be, can decree itself to be without power to decide the merits of a claim, and, in the same breath, render an effectual judgment on such merits. It is therefore clear that, even if Judge Newman intended, by citing the Inman case, to rule that Lesser's claim was invalid, he had no power to do so, because he had already held the claim to be not provable, and the ruling would have been obiter dicta and beyond his judicial authority. However, it is submitted that, as we have already shown, it was not Judge Newman's intention to rule that Lesser's contract had been avoided. His judgment was an entirely different one, towit: that his contract had not been broken at the date of the filing of the petition, and that, therefore, no claim or cause of action had then arisen thereon which was susceptible of proof. The effect of his decision was exactly what the plaintiff in error contends it to be—a judgment that the claim of Lesser had not come into existence at the date of the filing of the petition in bankruptcy and was therefore not provable.

The apprehension of the Court of Appeals that unless executory contracts are held to be avoided by adjudication in bankruptcy, they will survive against the bankrupt to harass him after his discharge is unfounded. If adjudication be treated as an anticipatory breach of such contracts, they will be provable, and being provable, the bankrupt will be discharged from them. It is believed that the only just and practical way to deal with the question of proving claims based upon executory contracts is to treat the adjudication in bankruptcy as, in practical effect it is, an anticipatory breach and allow the creditor to prove his damages according to the prin-

ciples established in the cases of Hochster v. De la Tour, 2 El. and Bl. 678, and Roehm v. Horst, 178 U. S. 1. These are old and established rules of procedure, the justice and expediency of which have been tested and approved by the actual experience of many years.

The following cases hold that bankruptcy is the equivalent of an anticipatory breach of an executory contract: In re Swift, 112 Fed. 315 (C. C. A. First Circuit; In re Pettingill, 137 Fed. 143 (D. C. Mass.); In re Neff, 157 Fed. 57 (C. C. A. Sixth Circuit, by Judge Lurton); In re Duquesne Incandescent Light Co., 176 Fed. 785 (D. C. Pa.); In re Dr. Voorhees Awning Hood Co., 187 Fed. 611.

See also: Lovell v. St. Louis Life Ins. Co., 111 U. S. 264; Carr v. Hamilton, 129 U. S. 669; In re D. Levy & Sons Co., 208 Fed. 479; In re Smith, 146 Fed. 923; Re Northern Counties of England Fire Insurance Co., 17 Ch. Div. 337, 341; Ex Parte Stapleton, 10 Ch. Div. 586, 590; and Benjamin on Sales (7th Am. Ed.) §759.

On the measure of damages: U. S. v. Behan, 110 U. S. 338, and Hinkley v. Pittsburg Steel Co., 121 U. S. 264.

The result worked out in the case of Watson v. Merrill, 136 Fed. 359 (C. C. A. Eighth Circuit) and like cases is an injustice to the bankrupt because, by establishing the claim to be not provable, it is left open to harass him after his discharge, which is thereby rendered practically nugatory. The leaning of the courts should be, as far as they are not plainly forbidden by the express terms of the law, to hold every claim provable, so that the protection afforded the bankrupt by his discharge will be real and not illusory and the beneficent purpose of the bankruptcy act effectuated. The argument of Watson v. Merrill and like cases that damages for the anticipatory breach of an executory contract are too contingent for proof is conclusively answered in Hochster v. De la Tour

and Roehm v. Horst, supra. There is also this peculiar feature in the conclusions reached in Watson v. Merrill. That case and indeed all like cases assume without discussion that if, prior to bankruptcy, there had been a renunciation or breach of the contract by the act of the bankrupt, the damages could have been estimated and proved. How, then when the breach results from adjudication, do the damages become too contingent to be estimated and proved? The character of the breach does not effect in any way the question of damages nor the the power of the court to anticipate the future and estimate what the damages will be, and if it can do so in the first instance, why not in the latter?

The result attained in the case of in Re Jefferson, 93 Fed. 948, and those following it, is unjust to the creditor, because, as we have endeavored to show, his claim, without any reason whatever or any default on his part, is entirely wiped out and destroyed.

The just and expedient course of procedure lies between the two. The adjudication in bankruptcy should be treated as an anticipatory breach, and the creditor be allowed to prove his damages according to the principles of Roehm v. Horst, supra. His claim thus being proved, the discharge would operate upon and end it and the bankrupt need fear nothing from it. Such procedure would be just to both creditor and bankrupt.

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7. "Because the petition shows that neither said firm nor any member thereof ever violated or breached said contract, and that any breach, or failure to comply with the contract, was due to the adjudication in bankruptcy proceedings; and that said contract, and any liability thereon, was dissolved, and discharged by operation of law; and that injury arising therefrom to the plaintiff was, in law damnum abseque injuria."

This seventh ground of the demurrer is a repetition in different language of the positions taken in the preceding grounds which have already been discussed.

It is respectfully submitted that the Court of Appeals erred and that its judgment should be reversed.

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LESSER *v.* GRAY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 110. Submitted December 9, 1914.—Decided January 18, 1915.

Where plaintiff in error seasonably sets up and claims that, because the bankruptcy court adjudicated his debt to be not provable the proceedings in bankruptcy and defendant's discharge are not a bar, a Federal issue is raised, and as in this case that question is not frivolous, this court has jurisdiction under § 237, Judicial Code.

A disallowed debt and a non-provable debt are not identical; and a claim that has been presented and disallowed as not having foundation is not a non-provable debt and the discharge is a bar.

In this case, *held* that the contract on which the claim sued for was based was either terminated by defendant's bankruptcy or non-compliance therewith constituted a breach, and in either case defendant was released by his discharge.

As plaintiff, suing on a claim disallowed in the bankruptcy proceeding, made no effort to review the action of the bankruptcy court in the

direct way prescribed by the Bankruptcy Act, the result in this case cannot be obtained indirectly by suit in the state court based on the contention that the debt was non-provable.

8 Ga. App. 605, affirmed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, and the effect of a discharge in bankruptcy, are stated in the opinion.

Mr. Henry A. Alexander, Mr. C. Henry Cohen and *Mr. Rodney S. Cohen* for plaintiff in error.

Mr. Alex. C. King and *Mr. Charles T. Hopkins* for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Lesser brought suit in the City Court of Atlanta against Gray and another, once members of Inman & Co., for damages alleged to have resulted from breach of contract by the firm. A demurrer was sustained and final judgment rendered for defendant; this was affirmed by the Court of Appeals of Georgia (8 Ga. App. 605); and the matter is here upon writ of error.

A motion to dismiss must be denied. Plaintiff in error seasonably set up and claimed that, because the bankruptcy court adjudicated his debt to be not provable (*Re Inman & Co.*, 175 Fed. Rep. 312), the proceedings in bankruptcy and discharge of defendant constituted no bar to a recovery thereon in the state court. A Federal issue is raised and we cannot say that it is too frivolous to give jurisdiction. *Rector* v. *City Deposit Bank*, 200 U. S. 405, 411.

The following summary adequately indicates the essentials of the original petition:

Inman & Co., a copartnership composed of Gray and

others, in July, 1907, agreed to purchase from Lesser 500 bales of patches—cotton bagging—to be delivered during the twelve months commencing September 1, 1907. About one-third was delivered and paid for prior to May 4, 1908, at which time an involuntary petition in bankruptcy was filed against the firm and its members. Shortly thereafter all were adjudicated bankrupts. Trustees were appointed, and in July, 1908, Gray obtained his discharge. Prior to the bankruptcy proceedings there was no breach or disavowal of the contract and thereafter no demand for further deliveries nor offer to make any.

In Feburary, 1909, Lesser presented a claim against the estate for his alleged loss. The trustees objected on several grounds. Among others these were specified: "That said claim is not a provable claim in bankruptcy under the provisions of the Bankrupt Act; that said claim on its face shows that at the time of the filing of the petition in said cause, and at the date of adjudication, the merchandise, the subject-matter of the claim, had not been delivered to the bankrupts as provided under the contract of sale therein set forth, but that all of said merchandise that had been delivered, to wit, the amount of 174 bales had been paid for. . . . Said proof shows that at the date of the adjudication, as well as the filing of the petition, no breach of said contract had occurred. . . . Your trustees show that the contract set forth is not such a contract as is avoided by an adjudication in bankruptcy, and, therefore, that the same is not a provable debt."

The referee disallowed the claim, and the United States District Court approved his action for reasons stated in a written opinion incorporated in the petition.

"Petitioner shows that the defendants have failed under said contract to accept and pay for 326 bales of patches at the contract price, and petitioner having retained said goods, defendants are indebted to him for the difference between the contract price and the market price at the

time and place of delivery under said contract; . . . that his said claim having been disallowed and adjudicated not provable in bankruptcy, the said discharges of the defendants are no bar to the prosecution of this suit, and the plea of bankruptcy is not available to the defendants;" and he prays for judgment.

In support of the demurrer defendant Gray maintains: (1) The plaintiff sustained no legal injury. Before any breach of the contract an involuntary petition in bankruptcy, afterwards sustained, was commenced against the partnership and its members; the partnership was dissolved, the contract rendered impossible of performance and annulled by the law; and whatever loss resulted was *damnum absque injuria.* (2) If there ever was a valid claim defendant's discharge in bankruptcy acquitted it. (3) The matter was submitted to a competent court of bankruptcy with exclusive jurisdiction, which disallowed the demand; no appeal was taken; and the question became *res judicata.*

The plaintiff in error insists: That he suffered legal damage because the contract of purchase was not fully complied with. "Under the classification of the act, claims are either provable or not provable;" when of the former class they are dischargeable, when of the latter they are not dischargeable. His "claim had been adjudged by the bankruptcy court, to which it had been presented for proof, to be not provable," and therefore the discharge constitutes no bar to his right to recover against the defendant.

Section 2 of the Bankruptcy Law (July 1, 1898, c. 541, 30 Stat. 544) invests courts of bankruptcy with jurisdiction to "(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; . . . (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determina-

tion of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; . . . (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act." A "'discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act." (§ 1.) "A discharge in bankruptcy shall release a bankrupt from all of his provable debts." (§ 17.) Debts of the bankrupt may be proved and allowed against his estate which are founded upon an open account, or upon a contract express or implied; and unliquidated claims may be liquidated in such manner as the court shall direct, and may thereafter be proved and allowed. (§ 63.)

A bankruptcy court in which an estate is being administered has full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or claim against the estate is based. This is essential to the performance of the duties imposed upon it. When an alleged debt or obligation is ascertained to be invalid—without lawful existence—the claim based thereon is necessarily disallowed. A disallowed claim and a non-provable debt are not identical things; and a failure accurately to observe the distinction has led to confusion in argument.

The United States District Court, being of opinion that an implied condition in Lesser's contract terminated it when the involuntary bankruptcy proceeding was begun, held that the bankrupt incurred no obligation to pay damage by reason of the firm's failure fully to comply there-

with. Accordingly the judgment in respect of the claim presented by plaintiff against the estate was that it be disallowed because without foundation—not that he had a non-provable debt.

The petition in the cause now under review was properly dismissed. If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach and defendant Gray became liable for any resulting damage; but he was released therefrom by his discharge. In this state of the record we will not enter upon a consideration of the specific reason assigned by the state court for sustaining the demurrer. No effort was made by plaintiff in error to secure a review of the action of the bankruptcy court in the direct way prescribed by the statute and that result may not be obtained indirectly through the present proceeding. The judgment of the court below is

Affirmed.